

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term 1955

United States Court of Appeals
For the
District of Columbia Circuit

Nos. 120-55
121-55
12,937

FILED

1955

EARL H. PELL

and

RALPH W. SCOTT, ...

vs.

THE UNITED STATES OF AMERICA, ...

CLERK
APPELLANTS,

APPELLEE.

Joseph W. Stewart

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA

v.

EARL H. PELL

and

RALPH W. SCOTT,

Defendants.

CRIMINAL ACTION

NOS. 120-55 & 121-55

Washington, D. C.,

Thursday, April 28, 1955.

The above-entitled cause came on for trial before the Honorable
F. Dickinson Letts, Judge, and a jury, at 10:25 a. m.

APPEARANCES:

ARTHUR McLAUGHLIN, Esq.,

Assistant U. S. Attorney, for the Government.

HARRY S. WEIDBERG, Esq., for the defendant Pell.

WILLIAM F. MANSFIELD, Esq., for the defendant Scott.

ANDRAMACKI K. TIMETEOU

(14)

was called as a witness by the Government, and having first been duly sworn,
was examined and testified as follows:

MR. McLAUGHLIN: Your Honor, this witness has difficulty understanding the
language, and I think that we should be given a little leeway in questioning
her. I will try my best to get along with her.

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q Now, madam, just face this way and take your time. Don't get excited.
Now what is your name?

A Andramacki Timeteou.

Q Where do you live?

A 1117 - 11th Street.

(15)

Q Talk a little louder, because it is a great big room here, you know,
and we have difficulty, you see. You have got to talk real loud. You can even
yell; I don't mind.

A 1117 - 11th Street, Northwest.

Q Is that in the District of Columbia? Is that in Washington, D. C.?

A Yes.

Q All right, and what kind of business do you run there?

A Grocery store.

Q Grocery store?

(15)

A Yes.

Q Do you own the grocery store?

A Yes.

Q You own it; is that right?

A Yes.

Q On January 18, 1955, were you in the grocery store on that date?

A Yes.

Q Is that right?

A Yes.

Q And were you in the grocery store between the hours of 7:00 and 8:00 that night, 7:00 and 8:00 p. m., night?

A Yes.

Q When you were in the grocery store, did something happened on January 18th? (16)

A Yes.

Q All right, now, tell us what happened.

Go ahead, come on, just tell us what happened.

Did someone come in the store?

A Yes.

Q Who came in the store?

(The witness pointing)

Q Which one? What kind of shirt has the man got on?

A He come in the store. I say, "Yes, sir?"

He say --

THE COURT: Wait just a minute.

MR. McLAUGHLIN: That is all right, let her go, Your Honor. I'll come back to that, now that I have got her started.

THE COURT: All right.

THE WITNESS: He say: "Give me one loaf of bread."

I say, "Over there, sir."

He take a loaf of bread and put it on the counter.

So later on he take a gun. He say: "Give me money, all the money."

I say: "I don't have any money."

So later on he take a gun.

"So I give you money," I say, "that is all." Me say, "That is all." (17)

He say: "Give me the change, too.

(17)

"I give you in quarters, too."

BY MR. McLAUGHLIN:

Q What did he have pointed at you? In other words, what did he have in his hand?

All right, now, start all over. Let's start again.

This man came in and asked you for the money; is that right?

A Yes.

Q When he asked you for the money, were you scared?

A Sure.

Q Why?

A Because.

Q Because why? Did the man have anything?

A No. -- just one girl over there, you know --

Q No. I say, did this man have anything in his hand?

THE COURT: Did he have anything in his hand?

THE WITNESS: Yes. "I give you money --

THE COURT: Tell him if he had anything in his hand. Tell him what it was.

BY MR. McLAUGHLIN:

Q What did he have in his hand?

Come on, now, you have got to answer the questions.

You say, he asked you for money; is that right?

A Yes.

(18)

Q All right, now, when he asked you for money, were you scared?

A Yes.

Q And why were you scared?

Well, now, did the man have anything in his hand at the time?

A Yes. "I give you money," you know. He is go.

Q When he asked you for the money, was there anything pointed at you?

I will show you this.

MR. McLAUGHLIN: Mark it as Government Exhibit No. 1.

THE CLERK: Government's Exhibit No. 1 for identification.

(A revolver was marked Government Exhibit No. 1 for identification.)

BY MR. McLAUGHLIN:

Q I will show you Government Exhibit No. 1 for identification.

THE COURT: Wait a minute. Has that been opened up?

MR. McLAUGHLIN: Yes. It is empty, Your Honor.

(18)

THE COURT: Mr. Marshal, look at it.

BY MR. McLAUGHLIN:

Q Now, when the man asked you for the money --

A Yes.

(19)

Q -- did you see this?

A Yes, sure.

Q Where did you see this, Government Exhibit marked for identification No. 1? Who had this?

A His (pointing).

Q When he asked you for the money?

A Yes.

Q How did he have the gun? How did he hold it? When he asked you for the money, was the gun pointed at you?

A Yes.

Q And how much money did you give him?

A \$50.00.

Q Do you see that man in court here today?

A Yes.

Q Will you point him out, please?

Will you point at him?

Put your finger out; point at him. Where is he?

THE COURT: Go around there and put your hand on his shoulder; will you do that? Step right around this way.

MR. McLAUGHLIN: She is a little frightened.

BY MR. McLAUGHLIN:

Q Has he got a coat on?

A Yes.

Q No, I mean the man that you say came in the store.

A Yes.

(20)

Q Do you see him in court here today?

A Yes.

Q Point at him. Where is he? Has he got a coat on today?

A No.

Q What kind of shirt has he got on?

THE COURT: Mr. Marshal, lead her around there.

MR. McLAUGHLIN: Take her around.

(The witness leaves the witness stand accompanied by the marshal.)

BY MR. McLAUGHLIN:

(20)

Q Put your hand on the man, the one you said came in the store.

THE COURT: Let the marshal get away.

(The witness points, then places her hand on the man's shoulder.)

MR. McLAUGHLIN: May the record show she identifies the defendant Pell?

THE COURT: Yes, the record may so indicate.

BY MR. McLAUGHLIN:

Q This \$50.00 that was taken from the store --

A Yes.

Q -- was your money? Was part of it your money?

A You know, my husband own the store and me work, you know. (21)

MR. McLAUGHLIN: All right, that is all.

THE COURT: And what is his name?

BY MR. McLAUGHLIN:

Q What is your husband's name?

A Kurakos Timeteou.

REDIRECT EXAMINATION

(26)

BY MR. McLAUGHLIN:

Q On January 20th, did she see this Pell at the precinct, at the station, the police house?

A She says yes, sir.

Q And in her presence, did this man say anything to the police?

A She says she doesn't remember him saying anything to us, but he had told her that he was sorry.

Q Who told her?

A Pell had told her he was sorry.

Q Sorry for doing what?

A She said that is all he said, he was sorry.

THE WITNESS: He said I am sorry, I am sorry, two times.

MR. McLAUGHLIN: That is all I have.

RECROSS EXAMINATION

BY MR. WEIDBERG:

Q When Mrs. Timeteou was called down to the station house on the 20th, who did she see when she got there?

A She said the man with the red shirt there, she says, and Scott (27) was in another room.

Q When she walked into the station house, who spoke to her first? (27)

A She says she doesn't remember who talked to her first.

Q But she spoke to somebody before she spoke to Pell?

A She says she didn't talk to Pell. Pell just told her he was sorry twice and that was it.

Q When Pell said this to her, was Pell with anybody?

A She says her husband was there, I was there, and there were two other gentlemen there.

Q When Mrs. Timeteou walked into the station house, what was the first thing she saw?

A She says she seen Pell sitting at a table and policemen around talking to him.

Q Did anyone speak to her when she walked into the room?

A She says one policeman asked her if this was the man and she said yes.

Q Did they ask her any other questions?

A No, sir.

Q Did Pell come over to her to say that he was sorry or did she go over to Pell?

A She says Pell was sitting down. She just walked in. She was standing up, and that is when he said he was sorry. (28)

Q How far away from her was he at the time he made this statement?

A She says about three or four feet.

Q What was Pell's appearance at the time?

A She said he was drunk.

Q He was drunk.

MR. WEIDBERG: That is all.

MR. McLAUGHLIN: That is all I have of the witness.

THE COURT: All right, you may step out, madam.

MR. McLAUGHLIN: Call Mr. Miller.

Thereupon --

EMANUEL MILLER

was called as a witness by the Government, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q Your full name is what?

A Emanuel Miller.

Q Where do you live, Mr. Miller?

(28)

A 1445 Ogden, Northwest.

Q What is the nature of your business?

A Liquor.

Q Where is your place of business located?

A 1216 - 13th Street, Northwest.

* * *

Q What is the name of the corporation?

(29)

A Mid-City Liquors, Inc.

Q And it was incorporated where?

A In the District of Columbia.

Q Was it in existence on January 20, 1955?

A Yes, sir.

Q Calling your attention to January 20, 1955, can you recall where you were between the hours of 7:00 and 8:00 that evening?

A I was in the store.

Q In the store?

A Yes, sir.

Q While you were in the store between those hours, did something unusual happen? (30)

A Yes, sir.

Q What was that, Mr. Miller?

A Well, I was in the store, my wife and a customer by the name of Mr. Smith and the delivery boy, Mr. Preston. Mr. Pell (pointing) --

Q When you say Mr. Pell, who are you referring to as Mr. Pell? Do you see him in court here today?

A The gentleman with the red jacket there (pointing).

Q The what?

A The one with the red and white jacket, shirt.

MR. McLAUGHLIN: May the record show he identifies the defendant Pell?

THE COURT: The record may so indicate.

BY MR. McLAUGHLIN:

Q You say that he came in the store?

A Yes, sir.

Q Approximately what time would you say he came in the store?

A He came in just a little before 7:30.

Q That is, P. M.?

A P. M.

(30)

Q What happened when the defendant Pell came in the store?

A When he got into the store, he had his hand in his right- (31)

hand pocket. Then he pulled the gun out, walked over to me, and he says, "This is it." He said, "Let me have it. I want it all." And he told Mr. Smith, the customer, just to stand aside there and stay there.

When he said that, I kind of hesitated and kind of stalled for a while there. I didn't think that he really meant it at the time. And then I looked down and I noticed that when he had the gun there, I saw the gun was loaded, then I knew that he meant business. So I kept stalling for a little while, and he says, "All right, come on, let me have it, I want it."

Q At the time he is talking to you, where is the gun?

A In his hand all the while, kept pointing at me.

Q Kept pointing at you?

A Yes, sir.

Q At that time, where was your wife, Mrs. Miller?

A She was next to me.

Q When you say next to you, how far away from you?

A Approximately about a foot and a half.

Q Then what happened?

A Then after, he walked over to where the wife was staying, pointed the gun at her, and she opened the register and gave him the money. And after he got the money, then he backed out of the store.

Q When he backed out of the store -- (32)

A Backed out of the store with the gun still pointing at us. And after he got out, my wife told Preston, the delivery boy, "See which way he went."

Q Did Preston have an occasion to leave the store?

A No, he was in there all the time.

Q What happened when the defendant Pell was backing out of the store?

A He still had the gun in his hand and he backed out of the store.

After he got out, then my wife told the delivery boy to --

Q Oh, she told him something?

A Yes.

Q As a result of that, what did your wife do or what did the delivery boy do?

A The delivery boy went out, and then I came up from behind the (32) counter, behind the delivery boy. When I got to the door, the delivery boy had already had him.

Q Had who?

A Pell, He struck him and had him down on the ground, And I went over and I put my foot on his wrist and released the gun and picked the gun up. In the meanwhile, the wife called the police, and when the officers came, I gave the gun to the officers and they took Pell and put him up against the wall and asked me did he have the money, and I told him yes, he has the (33) money in his pocket, and the officers took the money out of his pocket and also the gun, which I gave them.

Q How much money was taken from the register?

A Later on I found out it was \$95.00.

Q I will show you Government Exhibit marked for identification No. 1, Mr. Miller, and ask you if that is the gun taken from the defendant Pell?

A Yes, sir.

Q Was the gun loaded at the time that you took it?

A Yes, sir.

Q Do you recall how many cartridges were in the chambers?

A I saw two.

Q Prior to the defendant Pell's coming in your store that night on January 20th, had you seen him previously that night?

A Yes, about five minutes before he came into the store.

Q Where did you see the defendant Pell?

A He was standing in front of the Commander Restaurant.

Q Where is that in reference to your place?

A Directly across the street.

Q Was there anyone with him at this time?

A Yes, sir.

Q Who was with him?

A The other gentleman (pointing).

(34)

Q Who do you mean?

A This one here (pointing), with the gray coat.

MR. McLAUGHLIN: May the record show he points to the defendant Scott?

BY MR. McLAUGHLIN:

Q What were they doing at the time you observed them across the street?

A They were speaking to each other.

Q And how long would you say that was before Pell came into the (34)
store?

A Approximately about five minutes, five, six minutes.

* * *

THE COURT: Mr. Mansfield, you may inquire. (42)

BY MR. MANSFIELD:

Q Mr. Miller, you say that the robbery took place at 7:30?

A Approximately around about that time.

Q And about five minutes before that, you had seen Mr. Pell and Mr.
Scott across the street?

A Yes, sir.

Q And you also say that you were in the store from 7:00 until 8:00?

A Well, I went out. The reason for that is I went out to the (43)
delicatessen store, then I went over to the car, and that is when I saw them.

Q Where is the delicatessen store with reference to the liquor store?

A Just about three doors below the store.

Q To the right of the store?

A To the right as you leave the store.

Q Where was the car?

A Across the street.

Q You went across the street to the car?

A After I come out from the delicatessen store, I walked over to the
car and put what I bought at the delicatessen store into the car and came back
over to the store.

Q At approximately 25 minutes after 7:00?

A Approximately around about that.

Q You say Mr. Scott had been in the store quite often?

A Yes.

Q Could you tell us approximately how often?

A Well, I have seen him, oh, I would say about four or five times
myself. It is very seldom that I come down to the store.

Q Approximately when was the first time that you saw him?

A What do you mean?

Q What was the date, approximately, of the first time that you (44)
saw Mr. Scott?

A Oh, I would say -- before the holdup, you mean?

Q Yes, I said the first time.

A Oh, I would say about two weeks.

Q Approximately two weeks before the holdup?

(44)

A Yes, or maybe less, or maybe longer.

Q That was the first time that you had seen him?

A Yes, sir.

Q And you saw him approximately four times altogether?

A Yes, about four or five times I have seen him.

Q Was it kind of dark that night at the time that you went to the car?

A Well, there are plenty street lights and plenty lights from the Commander Restaurant. They had neon signs right in the window, which you could see a person very well. It wasn't that dark that you couldn't recognize anyone, and there was street lighting.

Q Was it light enough that you would recognize anyone that you had seen approximately four times?

A Yes, sir.

Q Do you recognize everyone that you see about four times?

A I think so.

Q How far did you have to go to the front door after the holdup?

A Well, to walk out from behind the counter -- say, for instance, (45) I was here (indicating). To walk out from behind the counter, I would have to walk where this gentleman was sitting (indicating) and walk around the counter and go out to the door.

Q In other words, you walk towards the front of the store to get around the counter?

A Yes, sir.

Q And you say Preston was approximately 15 feet from you?

A Well, I wouldn't say 15 feet, maybe a little less. I think it was less than that.

Q Was there an opening in the counter right near where Preston was?

A Preston was right in the aisle as you walk in, the flooring there. He was just standing right at the edge.

Q He was not behind the counter?

A No, he was not behind the counter.

Q So he had to walk or had to travel approximately 20 feet to get to the front door.

A That is right.

Q And how far from the front door did you discover Pell on the ground?

A He was, I would say, approximately about seven feet. (45)

Q So that Pell covered approximately seven feet while Preston (46)
covered 27 feet; is that correct?

A That is right. It could be a little more. I didn't take any measure-
ments. It could be a little more than seven feet.

Q After the robbery, how was the arrest made?

A The officers came right up.

Q Did you call?

A Yes, my wife called.

Q The officers arrested him?

A Yes, sir.

Q Did you accompany them down to the precinct?

A Afterwards we went down, not at that time, when they had taken him.

Q Were you called to the precinct or did you just go down of your
own accord?

A They told us to come down.

Q At the time they made the arrest, they told you to come down to
the precinct or did they made a phone call later?

A No, no. They told us to come on down. Well, offhand, I just don't
recall now if they called or -- I think one of the detectives called and said
for us to come down. I forgot his name now, but I know him when I see him.

Q You were not told, then, to come down to the precinct at the time
that the arrest was made?

A No.

Q What time was it when you got to the precinct? (47)

A After the store was closed.

Q What time was the store closed?

A 9:00 o'clock, sir.

Q Was it right afterwards that you went down to the precinct?

A Yes. Smith, my wife, Preston and myself, we all went down.

Q When did you close the store?

A At 9:00 o'clock, sir.

Q You went down to the precinct when you closed the store?

A That is correct.

Q Who else was there at that time?

A At the precinct?

Q That is right.

A Pell and Scott was there. Pell was sitting at the desk and (47)
Scott was in the back room standing, and he walked in and they told him to
walk back again.

Q And you identified Scott from that?

A From what?

Q From his walking into the room.

A Oh, yes. I saw him when we came in, I saw him.

Q You identified him as the same man that you had seen talking to
Pell?

A Yes, sir. (48)

Q When you saw him in the precinct?

A Yes, sir.

Q You saw him in one room and Pell in another?

A There is an opening that you could look right in and see.

Q Was there anyone else with Scott at the time?

A What do you mean?

Q At the time that you identified him in the precinct.

A No, there wasn't anyone in the room where he was staying.

Q Did you know why Scott was there?

A Did I know? After, I found out later on.

Q Did you know at the time?

A No, I didn't know.

Q In other words, you had not told the police before that you
had seen Scott and Pell talking before the robbery?

A Oh, yes, I told them when I came down to court here.

Q I am not talking about when you came down to court. I am talking
about before you went to the precinct. At the time the robbery was committed,
the arrest was made, did you then tell the police that you had seen Scott
and Pell talking?

A Well, the question wasn't asked of me if I saw Scott.

Q So you definitely did not tell the officers at the time the (49)
arrest was made that you had seen Pell talking to Scott?

A No, not at the time.

Q What did Scott have on?

A He had his topcoat on, no hat.

Q Was he wearing the same clothes when you saw him on the street?

A Yes, sir.

Q What color was the topcoat?

A It was like a salt and pepper, kind of very dirty looking. It (49)
was a salt and pepper, checkered something.

Q Did he have a tie on?

A Beg pardon?

Q Did he have a tie on at that time?

A Yes.

Q Did he have a coat under the overcoat, do you know?

A No. He had a suitcoat on under his topcoat.

Q Do you know what color that was?

A It looked like the one that he is wearing now.

Q Did the coat that he had on match the pants that he was wearing?

A Well, it could have and could not. I didn't take that particular
notice. When I glanced and saw him there, I knew he had kind of a gray coat
and his topcoat.

Q Do you know what kind of shoes he had on?

A No, sir, I didn't look at his shoes. (50)

Q Did you speak to him?

A No, sir.

Q You were so positive that it was he, and still you didn't speak
to him?

A There was no necessity for me to speak to him.

Q Why not?

A Well, why should I walk up to a person there, with both of them
conversing there, and I don't know the man, to go over there and have a
conversation with him? All I know, I seen him go in the store and buy and
go on out, that is all.

Q What did he buy in the store?

A He bought wine.

Q He didn't buy anything else?

A So far as I know, that is all he bought, was wine.

Q What time of the day was it when he came in there?

A Oh, I would say in the late afternoon and early evening.

Q Would you be more specific as to the time?

A Well, I would say about late afternoon.

Q Well, what do you consider late afternoon?

A Well, I would say around about 4:00 o'clock, after 4:00 o'clock.
Then around about, I would say, 6:00, 6:30, 7:00, something like that, he
would come in.

Q You saw him at 4:00 o'clock in the afternoon and approxi- (50-51)
mately 7:00 o'clock in the evening. You saw him a total of four times?

A That is right.

Q And yet you could recognize him so positively that you were sure it was he?

A Absolutely.

Q And the only thing you know of that he bought in the store was wine?

A That is correct, -- while I was there.

Q You know absolutely that he didn't buy anything else from you except wine?

A As far as I know him. When I was there, that is all he bought. What he may have bought from the wife and from the clerk or from the son-in-law, I wouldn't know.

Q Did you see him again between the time of the robbery and the time that you went to the precinct?

A No. The only time I saw him was the time before the robbery and when I went to the precinct. That is the only time I ever saw him. I haven't seen him then and after.

Q Do you know what color shirt he had on?

Q Mr. Miller, when you saw Scott in the precinct, what was he (53)
wearing?

A The same as I described there, a topcoat, a suit. (54)

Q He was wearing a topcoat, a suit?

A I guess it was a suit. Like I say, I didn't notice.

Q A tie?

A Yes, he had a tie on.

Q What color shirt?

A It was kind of dirty looking to me.

Q Was it a white shirt that was dirty?

A Well, I couldn't say offhand if it was a white shirt. It was light, but it was dirty, it looked like to me.

Q It may have been white or it may have been some other color, but it was a dress shirt; is that right?

A It was a dress shirt?

Q It was a dress shirt?

A Yes.

MR. MANSFIELD: That is all, Your Honor.

was called as a witness by the Government, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

(55)

Q Mrs. Miller, just face this way and talk real loud.

What is your full name?

A Clara Miller.

Q Where do you live, Mrs. Miller?

A Do you want the home address?

1445 Ogden Street, Northwest.

Q Mrs. Miller, do you have a place of business?

A Yes.

Q Where is the place of business located?

A 1216 - 13th Street, Northwest.

Q Is that in the District of Columbia?

A Yes.

Q What is the nature of the business which is located at that address?

A Liquor store.

Q Is it a corporation?

A Yes.

Q Are you a member of that corporation?

A I am the president.

Q And the business is incorporated under what name?

A Under the Mid-City Liquors, Inc.

Q Was the corporation in existence on January 20, 1955?

A Yes.

Q Calling your attention to that date of January 20, 1955, do (56)
you recall where you were between the hours of 7:00 and 8:00 p. m. that evening?

A In the store.

Q In the store?

A Yes.

Q That is the same store you referred to on 13th Street?

A That is right.

Q While in the store between the hours of 7:00 and 8:00 p. m., on January 20th, did something unusual happen there at that time, Mrs. Miller?

A Yes, there did.

(56)

Q Just tell us in your own way what happened.

A Well, I was behind the counter there and I saw a man walk in. He just walked in part way there, and then he had his hand in his pocket, and took out a gun and he says, "This is it, give me all your money," a holdup.

Q Where were you in the store at that time, Mrs. Miller?

A I was behind the counter.

Q Did you have a cash register in that store?

A Yes.

Q Where was the cash register?

A In the center of the store, on the counter.

Q How far away from the cash register were you?

(57)

A Oh, probably a couple feet or so.

Q Was there anyone else in the store besides you, Mrs. Miller?

A Yes. My husband was there.

Q Do you see the man in court here today who came in your store?

Q Yes, that one with the checkered shirt (indicating).

MR. McLAUGHLIN: May the record show she points to the defendant Pell?

THE COURT: The record will so indicate.

BY MR. McLAUGHLIN:

Q At the time the defendant Pell came in your store, where was your husband in the store with reference to where you were?

A He was on the right side standing a couple feet away from me talking to a customer that was in the store, Mr. Smith, while he was making a purchase at the time.

Q When you say that you saw the defendant with a gun, in what direction was the gun pointed?

A At my husband. He came over and pointed it right at my husband.

Q Did you hear what he said, if anything, to your husband at that time?

A Well, he said, "Give me all your money, give me the money." (58)

Q And then after he said that, what happened?

A Well, he was trying to open the register, and I said, "Go ahead, open it." So when he came over, and he held the gun at me, I opened the register and gave him the money.

Q Did there later come a time when you checked as to what amount of money you gave him?

A At the time I couldn't check, but when the police came back.

Q I say, after the police came.

(58)

A Oh, yes.

Q How much was that, can you recall?

A They told me it was \$95.

Q And that was the money of the Mid-City Liquors, Inc.; is that right?

A That is right, yes.

Q After the defendant Pell had received the money, what did he do or where did he go?

A He kind of backed out and turned around to walk out.

Q And as he backed out, what happened to the gun?

A He had the gun in his hand, I saw that.

Q When you say he had it in his hand as he backed out of the door —

A Yes.

Q — was the gun pointed in any particular direction as he backed (59) out of the store?

A He had it in his hand, I know that, and he put the money in his pocket.

Q Is that the last you saw of him that evening?

A That is the last I saw, yes.

MR. McLAUGHLIN: That is all.

CROSS EXAMINATION

BY MR. MANSFIELD:

(64)

Q Mrs. Miller, where were you with reference to the cash register at the time the robbery took place?

A Right near it.

Q You were right in front of it?

A In front? No, just the side of it.

Q Was it between you and your husband?

A The register?

Q Yes.

A Yes.

Q When you went down to the precinct afterwards, after the store was closed, did you see Mr. Scott?

A Which one is Scott? I don't know both. Which one?

Q Scott is the one on this side (indicating).

(65)

A The one on this side (indicating)?

Q That is right.

A I saw him before that. I never saw the other man.

(65)

Q At the precinct did you see Mr. Scott?

A Yes, I saw him as I walked into a room, I saw him sitting -- standing there.

Q Do you know how he was dressed?

A I think he had some kind of a sport coat on.

Q Sport coat?

A Well, I wouldn't know, just some kind of a coat; I wouldn't know the exact color. I know I saw him a few times before that. He used to come in the store. You mean this gentleman on this side (indicating)?

Q That is right.

A Yes, he would come in and buy a pint of wine. I saw him quite a few times in the store.

Q Did he ever buy anything but wine from you?

A No, just a pint of wine at a time.

Q Do you know approximately when you saw him for the first time?

A Oh, I wouldn't know the exact time, but it was off and on. I don't stand and watch each customer just when they come in, but I know him.

Q Well, was it a month before or two months before?

A Well, I saw him straight on from about a couple weeks before (66)
or so that I saw him around the store quite often.

Q A couple weeks after?

A Yes, I would know him when I would see him, you see.

Q You didn't see him, as far as you know, any time prior to a couple weeks before the robbery?

A Yes, he used to come in the store. Is that what you mean?

Q Yes.

A Yes, he would come in towards the evening, buy a pint of wine, sometimes around 4:30, maybe 5:00 o'clock.

Q Can you tell me approximately when was the first time that you saw him?

A Well, you see, I only come in on Tuesday and Thursday. Well, between those two days, probably I saw him that Tuesday and that night of, you know --

Q Which Tuesday? That is what I am trying to find out.

A Which Tuesday?

Q Yes.

A What do you mean?

Q Approximately what date did you see him for the first time? (66)

A Man, I can't put down dates of when they come in. I know if I saw him, it is Tuesday or Thursday. Well, I probably saw him that Tuesday of that week, because these are the only evenings I am on, and maybe 4:00 (67) 5:00 o'clock that Thursday of the robbery.

Q Actually, then, all you did was see him twice?

A I wouldn't say twice. I saw him more than twice.

Q You say the Tuesday and Thursday of that week.

A Yes, he would come in sometimes two and three times that evening for a pint of wine on one evening.

Q So you had not seen him at any time, say, a month before the --

A Probably I did. I wouldn't know just the exact date, but I knew when he came in, I didn't know him by name, but I knew who he was.

Q Would you say that you had seen him two months before the robbery?

A Two months?

Q Yes.

A I couldn't say the exact date. I know I saw him several -- very -- I wouldn't say the exact time, I couldn't.

MR. McLAUGHLIN: I can't see the materiality of these questions, Your Honor.

THE COURT: Well, let's see how far it goes.

MR. McLAUGHLIN: Unless he brings it right down to date.

THE WITNESS: You know people come in and out. I'm not going to put down the minute just when I'm in. I didn't expect to have to have anything (68) to do with him to mark down the time.

THE COURT: All right, your next question.

BY MR. MANSFIELD:

Q When you saw him down at the precinct, he was wearing some sort of sport coat?

A Some kind of a coat, I don't know, a short jacket. It wasn't a long coat. I think some kind of a coat. I wouldn't know just what he wore. I knew his face, that is all I knew. I didn't look at his clothes.

MR. MANSFIELD: That is all.

MR. McLAUGHLIN: I have nothing further.

GENEVA PALMER (69)

was called as a witness by the Government, and having first been duly sworn, was examined and testified as follows:

BY MR. McLAUGHLIN:

Q Madam, talk real loud. What is your full name?

A Mrs. Geneva Palmer.

Q Where do you live, Mrs. Palmer?

A 1210 N Street, Northwest.

Q Is that in the District of Columbia?

A Yes, sir.

Q Do you know the defendant, Mr. Scott?

A Yes, sir.

Q Do you see him in court here today?

A Yes, sir.

Q Will you point at him, please?

A This one right here (indicating) on the right side.

MR. McLAUGHLIN: May the record show she points to the defendant Scott?

THE COURT: The record may so indicate.

BY MR. McLAUGHLIN:

Q During the month of January, specifically, on January 20, 1955, (70)
did you know where Mr. Scott lived?

A Yes, sir. He lived 1210 N Street, Northwest.

Q Is that the same place where you live?

A Yes, sir.

Q Who else lived there with him, do you know?

A His wife was living with him.

Q Calling your attention to January 20, 1955, did you know where the
Mid-City liquor store was?

A Yes, sir, I did.

Q It was located where?

A It is on 13th Street, but I don't know the address.

Q Do you know what street it is near?

A It is near M Street.

Q Are there any other buildings in that immediate vicinity that you
know the name of, any of those apartments?

A The Commander Apartment.

Q The Commander Apartment?

A Yes, sir.

Q Where is the Commander Apartment located in reference to the Mid-City
liquor store?

A Across the street. (70)

Q Across the street?

A That is right.

Q Calling your attention to January 20, 1955, did you have (71)
occasion to be in that vicinity?

A Yes, sir, I was.

Q Can you recall approximately what time it was?

A Around 25 to 8:00.

Q 25 minutes to 8:00?

A That is right.

Q Where were you in that immediate vicinity?

THE COURT: Was that morning or afternoon?

BY MR. McLAUGHLIN:

Q Was that morning or afternoon?

A Afternoon.

Q In the evening, you mean?

A That is right.

Q Where were you in that immediate vicinity?

A Well, I had walked around the block and I was coming up 13th Street.

Q Did you see anyone in that vicinity at that time that you knew?

A I did.

Q Who did you see?

A Scott.

Q Where was Scott at the time that you saw him?

A Well, he was standing at the alley above the Commander Apartments.

Q Where is the alley, would you say?

A Well, right at the edge of the street it was. (72)

Q That would be where in reference to the Mid-City liquor store?

A Well, it is across the street, a little ways up.

Q What side of the street were you walking on when you saw the de-
fendant Scott?

A I was on the right-hand side going up the street.

Q On the right-hand side?

A Yes, sir.

Q Well, what side would that be in reference to the Commander Apartments?

A It is the same side.

Q Did you have an occasion to talk to Scott at that time?

A No, I did not.

(72)

Q Will you tell us what he was doing at that time?

A He was just standing there.

THE COURT: He was what?

THE WITNESS: Just standing, sir.

BY MR. McLAUGHLIN:

Q Where in reference to the sidewalk was he standing?

A He was standing right at the sidewalk.

Q This alley that you refer to runs along what building?

A Well, I don't know what the number would be.

Q No, I say, is it close to any particular building.

(73)

A Yes, it is.

Q What building?

A It is a rooming house or either an apartment house.

Q Where is this alley that you refer to in reference to the Commander Apartment?

A It is about two doors above.

* * *

CROSS EXAMINATION

BY MR. MANSFIELD:

Q What were you doing walking around the block?

A I had taken my dog for a walk.

Q What time did you go out?

A I left the house about 7:30.

Q Which way did you go?

A I went down 12th Street and back up 13th.

Q In other words, you went to the right when you first came out of your house?

A Yes.

Q And went down N Street to 12th Street?

A That is right.

(74)

Q Down 12th Street to M?

A Yes, sir.

Q Around M Street to 13th?

A Yes, sir.

Q And up 13th?

A Yes.

Q And back around the corner onto N Street and back to the house? (74)

A That is right.

Q Did you go around more than once?

A No, sir, just one time.

Q How were you dressed?

A Well, I just had on a house dress.

Q You just had on a house dress?

A That is right.

Q You didn't have anything over it?

A I had a coat on.

Q You saw Mr. Scott on 13th Street?

A I did.

Q Did you speak to him?

A No, sir.

Q You knew him, didn't you?

A I did.

Q Why didn't you speak to him, then?

A Well, I had no reason to speak. (75)

Q He had been living in the building with you, had he not?

A He had.

Q Was it your custom not to say hello to people that lived in the same building that you saw some place else?

A No, sir. When they come to my --

MR. McLAUGHLIN: I will have to object to this, Your Honor.

THE COURT: Sustained.

BY MR. MANSFIELD:

Q You recognized Mr. Scott definitely?

A I did.

Q And you left the house at approximately 7:30?

A That is right.

Q What time did you get back?

A It was about a quarter of.

Q About a quarter of 8:00?

A That is right.

Q So it took you 15 minutes to walk around the block?

A Well, I walked slow.

Q Did you walk more slowly after you saw Mr. Scott than you did (75)
before?

A I don't know that I did, -- about the same.

Q How far is that alley from the corner of 13th and N? (76)

A I don't know, sir.

Q It is more nearer N Street or M Street.

A It is more N.

Q It is nearer N --

A That is right.

Q -- than it is M?

A That is right.

Q Yet it took you 15 minutes to walk around the block?

A Well, I don't know exactly how long it took.

Q How far is 1210 N Street from the corner of 13th and N?

A I would say it is about halfway the block.

Q How was Mr. Scott dressed when you saw him?

A I don't know. He had on an overcoat. That is all I noticed.

Q You don't know whether he had a suit coat under it or not?

A I do not.

Q You don't know whether he had a tie on?

A No, sir.

Q How long had Mr. Scott been living in the building at 1210 N Street?

A I think he moved in in November, sometime in November.

Q In the beginning of November or the end? (77)

A Well, I don't know about that.

Q You don't know whether it was at the beginning or the end of November?

A No, sir, I don't.

Q Did Mr. Scott pay the rent to you or to your husband?

A Paid to my husband.

Q Then the only way that you knew him was from seeing him about the
premises; is that correct?

A That is right.

Q When he was taken out of the apartment at 1210 N Street to the
precinct, was he dressed the same way as the way you had seen him before?

A I don't know. I did not see him outside of my apartment at that time.

Q You did not see him?

A I did not.

Q Is it customary for you to take the dog for a walk? (77)

A Yes, it is.

Q What would you say was your usual time to take him for a walk?

A Well, I don't have no set time to take him.

MR. McLAUGHLIN: I object to this, Your Honor. It is immaterial.

THE COURT: Sustained. (78)

BY MR. MANSFIELD:

Q Did you usually take him for a walk every day?

A I did.

Q I will see whether this is objectionable or not. Was the route of the walk every day usually the same?

A Most the same all the time.

MR. MANSFIELD: That is all.

MR. McLAUGHLIN: I have nothing further with this witness, Your Honor. May she be excused?

PRESTON L. WILSON

was called as a witness by the Government, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q Talk real loud so we all can hear you. What is your full name?

A Preston Louis Wilson.

* * *

Q Calling your attention to January 20th of this year, 1955, (79) where were you employed, where did you work?

A Mid-City liquor store at 1216 - 13th Street.

* * *

Q Calling your attention to that date of January 20th, do you recall where you were between the hours of 7:00 and 8:00 p. m. that evening?

A I was standing at the back of the Mid-City liquor store.

Q Did there come a time when you came out from the back of that Mid-City liquor store, came out from the back, where you were?

A It happened about 20 minutes to 8:00, about that time, yes, he came in the store there.

Q Did you see him come in the store?

A Yes.

Q Where were you at the time that you saw the defendant Pell come in the store?

A You see, I had just gone about to the other side of the (80)
counter to start putting my beer away.

* * *

BY MR. McLAUGHLIN;

Q Keep your voice up, Preston. You say he put the gun up?

A Yes.

Q Was there anyone near him at the time that he put the gun up,
as you say?

A Mr. Smith was in there.

Q Anyone else?

A This other fellow, but I don't know his name.

Q Was there anyone else? Who did he put the gun on?

A Put the gun on Mr. Miller.

Q Was Mrs. Miller there?

A Yes, sir.

Q What did he say when he put the gun on Mr. Miller? (81)

A He told Mr. Miller, he say, "Let me have it." Mr. Miller thought
he was kidding with him, so he looked at him and saw the man had a gun in
his hand.

Q Did you see the gun?

A Yes, sir.

Q All right, go ahead, what happened?

A Mr. Miller looked at him and saw the gun in his hand and saw he had
some bullets in it, so he opened the cash register. So he told him to give
him everything. So Mr. Miller told him he wanted the change, too? He said,
"Yes, give me the change, too." So after he went out the door, Mr. Miller
told me to go out and see where he went. So I went to the door real fast.
When I went up there, I hit him.

Q When you got out the door, where was he?

A About five to six feet from the store.

Q In what direction, towards M or N Street?

A Towards N Street.

Q Towards N?

A Yes.

Q Now, from the store, when you go towards N Street, what apartment
is on that opposite corner there, on the corner of 13th and N?

A What apartment?

Q Oh, no, I was thinking of M. All right, now, how far away (82-81)
from the liquor store was the defendant Pell when you came out?

A About five to seven feet.

Q All right, and what happened?

A When I went to the door, that is when I hit him. He seen me come out,
and he went to turn around. That is when I hit him.

Q When you hit him, what happened to him?

A He hit the ground, and then I kept him there.

Q When you had him on the ground, did you see his hands?

A Yes, sir.

Q Was there anything in his hands?

A The gun was still in his hand.

Q The gun was still in his hand?

A Yes.

Q What did you do, if anything, with his hands?

A I held his hand until Mr. Miller come out there and he stomped on
his hand.

Q Was the gun taken from him at that time?

A Yes, sir.

Q The man you referred to as Pell, do you see him in court here (83)
today?

A Yes, sir.

Q Where is he?

A Right over there (indicating), with his hand on his head.

MR. McLAUGHLIN: May the record show he points to the defendant Pell?

THE COURT: The record may so indicate.

MR. McLAUGHLIN: That is all I have of the witness.

CROSS EXAMINATION

THE COURT: Do you have any questions? (88)

MR. MANSFIELD: I have, Your Honor.

BY MR. MANSFIELD:

Q When you chased Mr. Pell out of the store, which way did he turn?

A Which way did he turn?

Q Did he go toward N Street?

A He was going towards N Street. (89)

Q He was on the sidewalk?

A On the sidewalk.

Q He wasn't going across the sidewalk?

(89)

A No.

Q He was going up?

A He was going up.

Q Straight?

A He was going up straight.

MR. McLAUGHLIN: That is all.

DAVID PAUL

was called as a witness by the Government, and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q Officer, your full name is what?

(90)

A Private David Paul, attached to the Second Precinct.

* * *

Q Calling your attention to January 20, 1955, did you have occasion to answer a call in the 1300 block of 13th Street, Northwest?

A The 1200 block.

Q The 1200 block?

A Yes, sir.

Q What time did you arrive in that immediate vicinity?

A About 7:40 p. m.

Q Where did you go?

A To Mid-City liquor store. I believe it is 1218 - 13th Street, Northwest.

Q When you arrived in the vicinity of the Mid-City liquor store, what did you see?

A I saw a crowd of people on the sidewalk and the defendant Pell lying on the sidewalk and two or three men holding him to the ground.

Q Are you able today to tell me any of the names of the men that were holding him?

A Yes. There was a Mr. Smith and Mr. Baumgarden -- I can't pronounce his name -- and Mr. Miller was there, too, and Preston Wilson.

(91)

Q All right, did you then go through the crowd?

A Yes. We separated the crowd and we picked up Pell and put him up against the wall.

Q And did you talk to Pell at that time?

A No. We searched him at that time.

Q And when you searched Pell, what did you find on him, if any- (91)
thing?

A I found \$95 in bills in his pants pocket.

MR. McLAUGHLIN: Mark this Government's No. 2.

(An envelope containing money was marked for identification
as Government's Exhibit No. 2.)

BY MR. McLAUGHLIN:

Q Showing you Government Exhibit marked for identification No. 2,
Officer Paul, I ask you if that is the \$95 you found?

A Yes, sir, this is the money.

Q What did you do with the defendant Pell after you recovered the \$95
from his person?

A We put him in the scout car and took him to the Second Precinct.

Q When you took him to the Second Precinct, did you talk to him there?

A Yes, up on the second floor. (92)

Q And did you talk to him in reference to the Mid-City liquor store
robbery?

A Yes, sir.

Q What conversation did you have with the defendant Pell at that time
in reference to the robbery of the Mid-City liquor store?

A He admitted going into the store for the purposes of holding it up
and that he did so and he implicated --

Q No, you can't say that.

Did you have any other conversation with him at that time?

A No, that was about --

Q Did there come a time when you had any conversation with him in
reference to a robbery on January 18, 1955?

A Yes, sir.

Q When and where was that?

A That was at the same time.

Q What did he say as to that?

A He stated he went into the delicatessen at 1117 - 11th Street,
Northwest, and held that one up, too.

Q And do you know at this time the name of the owner of that
delicatessen?

A Not offhand. It is a Greek name. It is right difficult to pronounce.

Q Did you see her in court here today? (93)

A Yes, she was here in court.

Q Did you at a time bring that lady -- what is her name? -- (93)

Timeteou -- did you bring her to the precinct?

A Yes, we picked her up and took her to the precinct.

Q And you picked her up where?

A At the store on 11th Street.

Q Let me ask you this. How did you come to go to pick her up?

A Well, he, --

Q When you say he, who do you mean?

A Pell. We had handled the report on that robbery at the delicatessen two nights previous to this one, and he fit the description of the man who was described to us by the complainant as the one that held her up also. We asked him about it, and he admitted it at the time before the woman got there.

Q And it was as a result of his admission that the lady was brought to the precinct?

A She was brought there, that is right.

Q All right, when she was brought to the precinct, what happened at the precinct?

A She identified him as the one who had held her up, and he told her that he was sorry he had done it.

Q Did you have any other, further conversation with him at that (94) time that you can recall?

A I believe that is it.

Q At the time that you recovered Government Exhibit 1, the gun, do you recall whether or not it was loaded, whether there were any cartridges in it?

A Yes, sir. There were three cartridges in it, three full ones. One of the cartridges had a strike in the center.

MR. McLAUGHLIN: Mark this as Government Exhibit 1-A.

THE CLERK: Government Exhibit 1-A for identification.

(An envelope containing three cartridges were marked for identification as Government Exhibit 1-A.)

BY MR. McLAUGHLIN:

Q Who removed the cartridges from the gun? Were they removed in your presence?

A They were removed in my presence.

Q I show you Government Exhibit for identification 1-A and ask you whether those are the cartridges that were removed from the gun, Government Exhibit 1?

A Yes, sir, those are the cartridges. I put X's on all three of (94)
them.

MR. McLAUGHLIN: That is all I have of this witness.

CROSS EXAMINATION

BY MR. MANSFIELD: (99)

Q Officer, how did Mr. Pell describe Mr. Scott when you said that he
said he was in with him on the 13th Street job but not on the 11th Street job?

A Well, when we first locked Pell up and we searched his property, we
found a note inside of his wallet that had the address of 1210 N Street,
Northwest, Apartment 15. It said, "Enter through the rear." We asked Pell
about it. He wouldn't say anything about it. So Officer Georgantis went
around to that address, which turned out to be the apartment --

Q You didn't go around to the address?

A No, Officer Georgantis. He is out in the back. Well, Scott was
brought into the station and taken up on the second floor, and Pell said
that Scott was in with him on the holdup on 13th Street. When we brought
Scott into the room with Pell, he refused to make any statement in Scott's
presence.

Q You heard Pell say that Scott was in on the 13th Street job? (100)

A Yes, sir.

MR. MANSFIELD: That is all.

REDIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q Did he say how he was in on it --

A No, sir.

Q -- what part he played?

A He just said he was in with him on the 13th Street job, but he didn't
have anything to do with the 11th Street job.

MR. McLAUGHLIN: That is all I have of this witness.

JOHN GEORGANTIS

was called as a witness by the Government, and having first been duly sworn,
was examined and testified as follows:

DIRECT EXAMINATION

BY MR. McLAUGHLIN:

Q Now, Officer, your is what? (101)

A Private John Georgantis.

Q How do you spell the last name?

A G-e-o-r-g-a-n-t-i-s.

(101)

Q You are a member of the Metropolitan Police Department?

A Yes, sir.

Q Assigned to what precinct?

A No. 2.

Q Calling your attention to January 20, 1955, did you have an occasion to arrest the defendant Scott?

A Yes, sir, I did.

Q When and where did you arrest the defendant Scott?

A I locked him up at his home at 1210 N Street, Apartment 15.

Q Approximately what time did you lock him up?

A 8:00 o'clock, sir.

Q You say you locked him up. You locked him up with regard to what?

A This robbery on 13th Street.

Q Do you recall the name of the store?

A Mid-City Liquors.

Q At the time that you placed the defendant under arrest, whereabouts in his apartment was he?

A He was in the front room as you enter. I think it was the kitchen. (102)

Q And you entered the apartment from what street?

A N Street, sir.

Q While you were in the apartment and after you placed the defendant under arrest, did you make any search of the defendant?

A Of the defendant?

Q Yes, Scott. Did you search him?

A I padded him down.

Q Did you make any search of the room that you found him in?

A Yes, sir, I did.

Q I will show you Government Exhibit marked for identification No. 3 --

MR. MANSFIELD: May we approach the bench?

THE COURT: Yes.

(At the bench:)

MR. MANSFIELD: As I understand it, those are to be introduced as an exhibit because they fit the gun that was taken away from Pell. I think that was a .38 revolver, and the pieces that are about to be introduced now would fit any .38 calibre revolver. There isn't anything to identify them as a part of the gun that Pell had. Therefore, I move that it be suppressed.

MR. McLAUGHLIN: Well, of course, I can't say that they are specifically filling the gun, but it is just a circumstance, -- the fact that Mr. Miller saw him outside the store and the lady saw him outside the store about the time of the robbery, and then as the defense have brought out on cross examination of the witness, he admitted that Pell said Scott was in on the robbery on 13th Street. Whether it is a circumstance of course --

THE COURT: The objection is sustained, unless the Government has further evidence to connect the exhibit with the defendant.

(In open court:)

BY MR. McLAUGHLIN:

Q Were you at the precinct while Pell was there?

A Yes, sir, I was.

Q And was that lady there at the time -- what was her name the delicatessen lady?

A Yes, sir, she was.

Q What is her name?

A I couldn't pronounce it myself.

Q While she was at the precinct, did you act as an interpreter for her then?

A Yes, sir.

Q Did you hear the defendant Pell say anything to her while at the precinct?

A Yes, sir. He told her he was sorry.

MR. McLAUGHLIN: That is all, I think. (104)

THE COURT: Is that lady still in the courtroom?

MR. McLAUGHLIN: No, Your Honor. I excused her. She had to go back to that delicatessen.

CROSS EXAMINATION

BY MR. MANSFIELD:

Q You went around to 1210 N Street to arrest Mr. Scott?

A No, sir, I didn't go around to arrest him.

Q What did you go around there for?

A Well, we found a piece of paper in Mr. Pell's wallet with the address 1210 N Street, Apartment 15, which said "Use rear entrance."

Q Is that the reason you went around to 1210 N Street?

A Yes, sir. I thought he lived there.

Q You thought that Mr. Pell lived there? (105)

A Yes, sir.

Q When you got to the front door of 1210 N Street, you knocked (105)
on the door?

A Yes, sir.

Q Who answered it?

A I think Mr. Palmer,

Q What did you say to Mr. Palmer?

A I asked him if he had a Mr. Pell living there.

Q He said he didn't know anybody. I described Mr. Pell as an old man,
about 50, kind of heavy. He said he didn't know him.

Q And then what happened?

A I went to the back room, knocked at the back door, Apartment 15.

Q You went to the back door. You didn't say anything to Mr. Palmer?
I mean, you didn't get permission from him to enter his premises or anything
of the sort?

A Mr. Palmer? I had been in already. He had opened the front door, sir.

Q And you went directly back, then, to Apartment No. 15?

A Yes, sir.

Q Did you have any directions as to how to get to Apartment (106)
No. 15? How did you know?

A I think I asked Mr. Palmer. He said straight back.

Q And you arrested Mr. Scott?

A Yes, sir, I did.

Q What were your grounds for arresting him?

A First of all, we found a pair of gun grips on his dresser top, and
the gun we took off Pell didn't have any gun grips. They matched pretty good.
Second of all, I had asked Mr. Scott if he knew a Mr. Pell. He said no, he
never knew a Mr. Pell. I described Mr. Pell, and he said he never heard of
him even then. And I asked him if he had been out of the house. He said no,
he had been home all day. And I had just finished talking to Mrs. Palmer.
She said she had seen Mr. Scott standing on 13th Street, right across the
street from the liquor store, about the time of the holdup. Mr. Scott denied
even being out of the house or even knowing Mr. Pell.

Q Well, now, you just said that you talked to Mr. Palmer and went
on back to the apartment. You didn't say anything about talking to Mrs.
Palmer at all.

A She was there.

Q After you arrested Mr. Scott, you took him down to the precinct?

A Yes, sir, I did. (106)

Q How was he dressed?

A How was Mr. Scott dressed?

Q Yes. (107)

A If I am not mistaken, I think he had the same suit on. I am not too sure; I don't remember.

Q Did he have a dress shirt on or a tie or was he wearing an overcoat?

A When I went in the house?

Q No, when you took him down to the precinct.

A I don't think so; I don't remember.

Q You don't remember whether he was wearing a coat?

A No, sir, I don't remember.

Q You had a written statement -- you found a piece of paper in Mr. Pell's billfold that gave the address 1210 N Street, Apartment No. 15, go in the back door; is that correct?

A It said, "Use rear entrance."

Q At that time, did you know that it was Mr. Pell?

A Pardon?

Q At that time, did you know he was Mr. Pell?

A Did I know he was Mr. Pell?

Q Yes.

A Yes, sir.

Q You knew that that was his name?

A Pell.

Q There wasn't any other identification or anything in the billfold?

A There was. I don't remember what it was.

Q Are you sure that you asked Mr. Scott if he knew Mr. Pell or (108)

if he knew somebody else?

A I asked him if he knew Mr. Pell. I even described Mr. Pell to him.

Q You are sure that you used the name Pell instead of another name that was in the billfold?

A To Mr. Scott?

Q Yes.

A Yes, sir. I used the name Pell and I described him to him. He still denied knowing him.

Q You are positive that Scott denied knowing Pell?

A Yes, sir, he did.

Q Did you hear Mr. Pell say that Scott was in on the 13th Street job with him? (108)

A Yes, sir, I did, at the station.

Q Was the reason that you went around to 1210 N Street because you thought Mr. Pell lived there or because you thought Mr. Scott lived there?

A I didn't know Mr. Scott, sir.

Q You had no idea that Mr. Scott was there?

A No, sir, I didn't.

Q And still you say that Mr. Pell told you that Scott was in on the 13th Street job?

A At the station, yes, sir. That was after I had brought them both in.

Q Oh, it was after you brought Mr. Scott in that Mr. Pell said that Scott was in with him on the 13th Street job? (109)

A Yes.

Q Was Scott present at the time that statement was made?

A Scott was sitting in another room when Pell made that statement, and we brought Scott in the room and asked him to repeat it, but he wouldn't do it. He said he was scared of him.

Q And you don't know how Scott was dressed at the time you took him out of the house?

A I don't remember, no, sir. He was shaving when I went in.

Q Did you allow him to finish shaving?

A I don't remember. I think he was through.

Q Would you mind telling us why you placed Mr. Scott under arrest if you thought that Mr. Pell lived in Apartment No. 15 at 1210 N Street?

A Why?

Q Would you mind telling us why you arrested Mr. Scott?

A Because I found a pair of hand grips which fit the gun that Pell had, plus Mr. Scott denied being out of the house at all all day long and Mrs. Palmer had told me that she had seen him around 13th Street at the time of the holdup right across the street from the liquor store. (110)

Q And you think that that was sufficient reason for arresting him?

A Yes, sir, I did.

MR. MANSFIELD: That is all.

* * *

MR. WEIDBERG: At this time I move for a directed verdict, Your Honor.

THE COURT: Motion denied. (111)

MR. MANSFIELD: At this time I would like to move for a directed (111)
verdict as to the defendant Scott.

THE COURT: Motion denied.

You may proceed.

Thereupon --

EARL H. PELL,

one of the defendants herein, was called as a witness in his own behalf,
and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WEIDBERG:

Q Will you tell the Court your name and address?

A My name is Earl H. Pell, P-e-l-l.

Q Your address?

A 1318 - 10th Street, Northwest.

Q What is your occupation?

A Farmer.

Q Farmer?

A Yes.

Q Whereabouts is your home?

A Ridgeville, North Carolina.

Q Coming back to the night of January 20, 1955, will you please tell
the Court and the jury all that you can remember concerning the events of that
night?

A Well, all I can remember concerning the events of that night, (112)
approximately 3:30 or 4:00 o'clock on the day, Thursday, I believe it was,
on the 20th, I had been drinking a good deal and I went down on 9th and
New York Avenue, and I run into some boys down there who were drinking, and
I continued drinking, and they had some kind of pills; I don't know, they
call them seconal or something like that, and I used some of those to go
with the wine.

Early in the part of the day I had gone up to Mr. Scott's house and
carried a half pint of whiskey with me up there. And we drank there, and
then there was some more drinks there at the house, and then, as I said
before, along about 4:00 o'clock, I went down to -- to the best of my
knowledge, I don't know, it was in the afternoon, anyhow, that I went down
to 9th and New York Avenue, and there I had some more wine and some of those
seconals.

Q What time of day was this?

MR. MANSFIELD: At this time I would like to move for a directed (111)
verdict as to the defendant Scott.

THE COURT: Motion denied.

You may proceed.

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carried a half pint of whiskey with me up there. And we drank there, and
then there was some more drinks there at the house, and then, as I said
before, along about 4:00 o'clock, I went down to -- to the best of my
knowledge, I don't know, it was in the afternoon, anyhow, that I went down
to 9th and New York Avenue, and there I had some more wine and some of those
seconals.

Q What time of day was this?

A That was on New York Avenue?

(112)

Q Yes.

A Well, I suggest it was around 4:00 o'clock. I don't know exactly what time it was.

Q When had you awakened that morning?

A I don't remember. It was around noon, I reckon.

Q Between 12:00 o'clock and 4:00 o'clock, do you have any notion of how much liquor you had consumed?

A Well, no, sir, I sure don't. I was drinking regular wine mostly and liquor on some occasions. (113)

Q But you don't know exactly how much you had had?

A No, sir. We had three half gallons at Mr. Scott's house. I remember those being brought there, but I don't know how much was consumed. I know I consumed my part of it.

Q Were these three half gallons filled when you got there?

A No, sir. I taken half a pint of liquor there when I went, and I believe Mr. Scott's wife went out and got the wine. I give her the money and she went out and got the wine.

CROSS EXAMINATION

(115)

BY MR. MANSFIELD:

Q On January 20th, did you go down to 15th Street for Mr. Scott.

A Yes, sir.

Q What did you go down there for?

A He sent me down there to get some money, that he worked down there at 927 - 15th Street, I believe is the address on that paper. I had a paper to go there.

Q And did the boss give you any money?

A He didn't at that time. He told me to come back later.

Q Well, did you go back later and get it?

A About 2:00 o'clock, I think he said, I don't know.

(116)

Q How much was it?

A \$15 is what it was supposed to be.

Q You took that up to Mr. Scott?

A Yes, sir.

Q About what time was that?

A I don't recall what time it was. I walked from there to 927. I don't know how long it takes to walk.

Q Well, it was about 2:00 o'clock that you got the money at (116)
927 - 15th; is that right?

A Yes.

Q And you walked from 927 up to 1210 N Street?

A Yes.

Q You didn't buy anything with that money on the way?

A No, sir. I bought a half pint of liquor.

Q With the money that the boss had given you for Scott?

A No, sir, I didn't use his money.

Q Do you remember making any purchase after you got to Scott's with
the money that the boss had given you for Scott?

A I do not.

Q Do you know whether Mr. Scott bought anything with that money?

A I do know I give her some money to go get some wine, but early (117)
in the day.

Q You gave Mrs. Scott some money?

A Mrs. Scott.

Q Mrs. Scott, before you collected the \$15 from the boss?

A Yes, sir.

Q Was there anything purchased that you know of after you brought
the \$15 up to Scott?

A I don't remember.

MR. MANSFIELD: That is all.

BY MR. McLAUGHLIN:

* * *

Q You mean you lived from January 1st until January 20th and (119)
only paid one week's room rent?

A There was two of us in the room altogether; that is all I remember.

Q Who lived in the room with you?

A A Paul Kaiser.

Q Paul Kaiser?

A Yes.

Q Did he live in that room with you all the time?

A Yes, sir, all the time I was there.

Q How long have you known Scott?

A Well, I knew him quite a while. I don't recall how long. It was
several years.

Q Did you know him before you came to Washington? (119)

A I had seen him, yes, sir.

Q Where had you seen him?

A Greensboro.

Q North Carolina?

A Yes, sir.

Q How long had you been up in Washington before you saw him? (120)

A About a week, I reckon, something like that.

Q And from the first week in January up until January 20th, how long would you been in the company of Scott?

A Well, I don't recall all the time I was in the company with him. I was drinking very heavy.

Q What?

A I would say some three or four times, three or four occasions.

Q And where would you see him?

A I met him on the street one time.

Q Would you go to his house?

A I have been to his house, yes.

Q How frequently would you go to his house?

A Well, I must have went there three or four times.

Q Was that in the daytime, night time or when?

A Daytime.

Q How?

A Daytime.

Q Wasn't Scott working during that time?

A He was working when I first met him, yes, sir.

Q What do you mean when you first met him?

A He was working at this place he said where he sent me to get the money for him.

Q When did he send you to get the money (121)

A It was on a Thursday, I believe.

Q January 20th?

A Yes, sir.

Q And what time of the day or night did he send you to get the money?

A I first went up there in the morning, right after I come there and taken a few drinks. He said, "While you are sober, you better go get this money."

Q What was the matter with Scott that he didn't go get the money? (121)

A He was sick.

* * *

Q What time did you go for the money for the first time?

A About sometime in the morning.

Q What time? (122)

A I would say between 9:00 and 11:00; I don't know what time.

Q Where were you at that time when you talked to Scott?

A In his house.

Q And that is on what street?

A 910 N Street, I believe it is, 1210 or 910.

Q How were you able to find the place where Scott's boss was?

A He give me a piece of paper.

* * *

Q Then you say you got the half pint of whiskey, and you went (123)
where?

A To Scott's house.

* * *

Q What time would you say you got back to Scott's house? (125)

A Well, it was before noon, I imagine.

Q Before noon?

A I imagine it would take 15 or 20 minutes to walk back from down
there. I don't know exactly what time.

Q What did you do when you were at Scott's house when you returned
at noontime?

A I drank some more.

* * *

Q How many people were at Scott's house at that time?

A Some four or five people. (126)

Q Who were they, can you recall?

A No, sir.

Q Can you name any of them?

A There was some man and his wife. I don't know who they were.

Q Did you ever see them before?

A Yes, sir, I have seen them before.

Q Where had you seen them before?

A I seen them out on the street there before.

Q Were you introduced to them?

A Yes, sir. They called the boy John something. He was from (126)
North Carolina. His name was John.

Q John?

A Yes.

Q Was Scott there at that time?

A Yes, sir.

Q Was Mrs. Scott there?

A Yes, sir.

Q Who all drank that half pint?

A I just set it up. I don't know who drank it. I didn't pay no
attention.

Q A half pint wasn't much among all those people, was it?

A Three half gallons wine.

Q Now you say you stayed at the house until 4:00 o'clock. All (129)
right, and what did you do at 4:00 o'clock?

A I left there. I don't say exactly 4:00, but I left there in the
early part of the afternoon.

Q All right, where did you go at 4:00 o'clock?

A To 9th and New York Avenue.

Q And who did you see there?

A I seen some boys down there and we started drinking.

Q Just talk louder.

A I seen some boys down there drinking and I started drinking with
them.

Q Well, now, where were you going at that time?

A I didn't have any place to go.

Q When did you go back and get the money?

A I don't remember that.

Q Didn't you testify on direct examination that the boss gave you
about \$15?

A Well, I went and got the money before I left at 2:00 o'clock, I
believe.

Q That is what I am trying to find out.

A You didn't ask me that question.

Q You say you stayed at the house until 4:00. When did you leave the
second time to go and get the money?

A I would say it was between 2:00 and 4:00 sometime.

Q Between 2:00 and 4:00?

A Yes, sir.

(130)

* * *

Q You mean to say this man gave you \$15 belonging to Scott and
you were drunk? (131)

A Yes, sir.

Q All right, now, after you got the \$15, where did you go?

A To his house.

Q How were you able to find your way back to his house?

A I had the address there on the paper.

* * *

Q Well now, when you came back to Scott's house with the \$15, what
time was it? (133)

A Somewhere in the neighborhood of between 2:00 and 4:00 o'clock.

* * *

Q When you returned to Scott's house, was Scott there?

A Yes, sir. (134)

Q Did you go out of the house after that?

A I left altogether.

Q What time did you leave altogether, as you say?

A In the early part of the afternoon.

Q What time was that?

A Well, it wasn't dark. It wasn't near dark. I don't know what
time it was.

Q Was it 5:00 or 6:00?

A It was in the neighborhood of 4:00 o'clock and maybe after, I
don't know.

Q You center around 4:00 o'clock.

A Yes.

Q Where did you go when you left Scott's house?

A To 9th and New York Avenue.

* * *

Q Let me ask you, where did you get this gun? (138)

A I do not know.

Q How?

A I don't know.

Q Well now, did you have this gun on you when you left Scott's house?

A I have had it in my pocket, yes, but I don't know where I got it.

Q When do you remember last having this gun on your person?

A In that alley.

(138)

Q What alley?

A Behind the Deluxe on New York Avenue.

Q That was after you left Scott's house?

A Yes.

Q Well, did you have the gun in your pocket while you were in
Scott's house? (139)

A Yes, sir. When I went to give him my money, I felt the gun in my
pocket then.

Q Well now, that was 10:00 o'clock in the morning, wasn't it?

A No, sir, that was in the afternoon.

Q Well now, you first went up to get the money about 9:00 or 10:00
o'clock in the morning, didn't you?

A Yes, that is right.

Q Isn't that the time you gave Mr. Scott the money?

A That is right.

Q Isn't that the time you found the gun in your pocket?

A Yes, sir.

Q Well now, why didn't you get rid of the gun?

A I don't know.

Q Did you check the gun at that time to find out whether it was loaded?

A No, sir.

Q What?

A I did not.

Q You were sober then, weren't you?

A I didn't check the gun.

Q What?

A I said I didn't check the gun.

Q Well now, did you have the gun with you the day before? (140)

A I don't remember.

Q Well, did you have it two days before that?

A I don't remember.

Q What?

A I don't remember.

Q You say that you were carrying a gun around with you and you don't
remember?

A I don't remember whether I had it the day before.

Q Where did you get the gun? (140)

A I told you I don't remember.

Q Well now, when you were at Scott's house, did you talk to him about the gun?

A No, sir.

Q How?

A I did not.

Q Where are the handles here, the plates?

A I don't know where they are.

Q Did you have them in your possession at any time?

A I missed them when I got on New York Avenue and reached in the pocket, and I found the handles wasn't on there.

Q When is the last time you saw the gun with the handle plates on?

A I don't remember.

Q Before you got to New York Avenue? (141)

A No. I didn't look until I got to New York Avenue, but I told you when I reached in my pocket to give the boy some money to get some wine, I found out that I had the pistol in my pocket.

Q Well now, that is the second time?

A Yes.

Q You say at that time that the plates were off the handle?

A Yes, sir, I remember them being off.

Q You remember leaving them at Scott's house?

A No, sir.

(The jurors leave the courtroom, and the following proceedings are held in the absence of the jury:) (181)

THE COURT: Mr. Mansfield, do you have anything? (183)

MR. MANSFIELD: Your Honor, I would like to make a motion for the dismissal of the action against the defendant Scott. The arrest of Scott was, in my opinion, illegal. The policeman who testified that he had arrested Scott arrested him on the basis of having found a clip and some bullets in Scott's apartment. The introduction of that into evidence was objected to and the objection was sustained. So that would leave the only thing that the arrest could have been made upon, could have been based upon, the statement to the policeman by Mrs. Palmer that she had seen Scott outside of the apartment. The very fact that she had seen him outside of the apartment certainly was not any reason for thinking that he might have been involved at all in (184)

the robbery. He could very easily have been seen out of the apartment (184) and gone to the other end of town. So for that reason I don't think that the policeman had any probable cause for placing Scott under arrest. For that reason I am asking his arrest be dismissed.

THE COURT: Mr. McLaughlin, what is your case against Scott?

MR. McLAUGHLIN: As far as Scott is concerned, Your Honor, you will recall that Mr. Miller testified that just a short time before the robbery he saw the defendants Pell and Scott across the street together, and then a short time after that the robbery took place. Then we have Mrs. Palmer, I believe, who testified she knew the defendant and saw him across the street about the time of this robbery standing in this alley adjoining the Commander Apartment House, I believe. In addition to that, the defense themselves brought out on cross examination of the police officer Georgantis, I believe it was, that the defendant Pell said that Scott was in on the 13th Street job but was not in on the 11th Street job.

THE COURT: As to that, I will have to instruct the jury that any oral statements made by Pell would not bind Scott unless they were made in Scott's presence.

MR. McLAUGHLIN: Then on cross examination of the police officer, the defense attorney further brought out that in the room with Scott at the time were these plates from a gun that fit the gun that was taken from the (185) defendant Pell's hands.

MR. MANSFIELD: I beg your pardon, Your Honor, but I don't think that was brought out on cross examination.

MR. McLAUGHLIN: Yes. He asked the police officer why he arrested the defendant Scott, and the police officer said he arrested him because he had talked to Scott and Scott said he denied being out of the house all that day, that he didn't know Pell. Then he said he talked to the Palmer woman and the Palmer woman said she saw the defendant out. And he had already arrested the defendant Pell and saw the gun without the plates on it. He said in addition that he saw them on the bureau there and he knew they fit the gun that had been taken from the defendant Pell. Because of that, he locked him up. That is the sum and substance of what we have, Your Honor.

THE COURT: The Court thinks there is enough evidence to allow the jury to pass upon the facts. The motion will be denied.

Do counsel have any prepared instructions or is that left to the Court?

THE COURT: Ladies and gentlemen of the jury, the two cases have been consolidated for trial before this jury. The first case, Criminal No. 120-55, jointly charges the defendants Earl H. Pell and Ralph W. Scott with the crime of robbery. The second case, 121-55, charges the defendant Earl H. Pell with the crime of robbery.

The statute provides that whoever by force or violence, and against resistance or by sudden or stealthy seizure or snatching or by putting in fear, shall take from the person or immediate actual possession of another anything of value is guilty of robbery and shall be punished.

The first case mentioned, 120-55, charges that on or about January 20, 1955, within the District of Columbia, the defendants Earl H. Pell and Ralph W. Scott, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Clara L. Miller property of Mid-City Liquor, Inc., a body corporate, of the value of about \$95, consisting of the following: \$95 in money.

To this indictment each of the defendants has entered a plea of (205) not guilty.

In case 121-55, it is charged that on or about January 18, 1955, within the District of Columbia, the defendant Earl H. Pell, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Andramacki K. Timeteou property of Kurakos Timeteou of the value of about \$50, consisting of the following: \$50 in money.

To that indictment the defendant Pell has entered a plea of not guilty.

You are told that an indictment is not evidence in any degree whatever. The purpose of the indictment is to inform the accused of the offense with which he is charged, and the only use which may properly be made of the indictment by this jury is to determine the nature of the charge made in the indictment against the one or the ones charged.

You are told that in the first instance, there is a presumption in law that the one who stands accused is not guilty of the offense with which he is charged. This presumption of innocence should prevail in the minds of the jury in such a way as to cause them to find the defendant not guilty, unless from all of the evidence in the case the jury are convinced beyond a reasonable doubt that the defendant is in fact guilty of the offense with which he (206) is charged.

The burden of proof rests upon the Government, which means that (206)
before this jury will be warranted in finding these defendants or either
of them guilty, the Government must prove that guilt and the jury must find
that guilt from the evidence to its satisfaction beyond a reasonable doubt.
A reasonable doubt means such a doubt as will leave the juror's mind, after
a candid and impartial investigation and consideration of all of the evidence
and of all the facts and circumstances shown in the case, so undecided that
the juror is unable to say that he or she has an abiding conviction of the
defendant's guilt. It is such a doubt as in the graver and more important
transactions of life would cause a reasonable and prudent person to hesitate
and pause. If the evidence fails to come up to this standard, it is such as
to warrant such a doubt, and if you have such a reasonable doubt as to the
guilt of either of these defendants, the law requires that you give that
defendant concerning whom you have such reasonable doubt of guilt the
benefit of that doubt and acquit him.

The words reasonable doubt must be given their usual and ordinary meaning.
The doubt must not be trivial or whimsical. It should not be based upon
groundless conjecture and should not be sought after, for when it is such a
doubt as the law recognizes, it comes fairly and naturally into the minds
of the jury and arises out of the evidence or from a lack of necessary (207)
evidence. It must be such a doubt as appears to you to be reasonable in the
circumstances of the case as shown by the evidence.

Since the defendants Pell and Scott are jointly indicted in Criminal
Case 120-55, there is a principle of law which I should bring to your atten-
tion. It is this. If two or more persons are jointly engaged in an unlawful
enterprise, each person so jointly engaged adopts as his own everything done
or said by any other person so jointly engaged in the furtherance of the
common unlawful purpose. This principle of law arises out of the statute
which provides that in prosecutions for any criminal offense, all persons
advising, inciting or conniving at the offense or aiding or abetting the
principal offender shall be charged as principal.

I mention this principal of law because you are told that if you find
that Scott was jointly engaged in the purpose of committing the robbery of
Clara L. Miller of the property of the Mid-City Liquors, Inc., a body cor-
porate, with the defendant Pell, and if you find that Pell committed the
robbery as charged and that Scott was jointly engaged with him in the per-
petration of the robbery, it would make no difference what part one took,

what part the other took. And so, since there is no evidence that Scott (207) entered the liquor store, you cannot convict unless you find that Pell committed the crime and that Scott was concerned and interested with him in the perpetration of that crime and stood outside as a lookout to (208) protect Pell in the commission of the crime or to make his escape after the offense was committed or for some other purpose connected with the plan to perpetrate the crime.

Certain evidence has been received that when in the custody of the police officers the defendant Pell made certain oral statements or admissions. You are told that statements or admissions freely and voluntarily made by one at a time when he is possessed of his senses and knows what he is saying and doing may be considered and weighed by the jury as bearing upon the question of that defendant's guilt, but the evidence relating to any such oral statement or admission must be considered and weighed by the jury with caution.

Now you are told that the evidence before the jury relating to such oral statements or admissions by the defendant Pell does not indicate the statements were made in the presence of the defendant Scott. Accordingly, any statements or admissions made by Pell, as you may find from the evidence, may not be considered and weighed as against the defendant Scott. You are told as relating to such evidence, in considering the guilt or innocence of the defendant Pell, that before you can consider and weigh such evidence of such statements or admissions against the defendant Pell, you must find to your satisfaction beyond a reasonable doubt that such statements or admissions were freely and voluntarily made by the defendant Pell and that (209) they were not the result of inducement, coercion, intimidation, threats, promises, duress or compulsion of any kind exercised by any officer of the law or any other person over the defendant Pell.

It is the duty of the jury to disregard the evidence of any such oral statements or admissions altogether if you have a reasonable doubt as to the voluntary character of such statements or admissions.

In addition to the general plea of not guilty, the defendant Pell has interposed the plea of alcoholism. As used in this connection, the term alcoholism means such a perverted and deranged condition of the mental and moral faculties as to render a person so afflicted incapable of distinguishing between right and wrong or unconscious at the time of the nature of the act he was committing, incapable of knowing if it was wrong.

You are told that the burden of proof rests upon the Government (209) to convince the jury by proof beyond a reasonable doubt that the defendant Pell was mentally capable at the time he committed the act complained of in the indictment. Moreover, you are told that if you find from the evidence that the defendant Pell did commit the act complained of in the indictment, there is a presumption in law that at the time he committed the act, he was mentally capable of knowing and understanding the nature of the act and of knowing that it was wrong. Such presumption is enough to carry the (210) burden of proof of there being such mental capacity at the time he committed the act, unless you should find that such presumption is put in issue by the evidence of the case and overcome. In any event, it is an issue for the determination of this jury, and the burden rests upon the Government in order to convict the defendant Pell to prove that the defendant Pell was mentally capable and did know and understand the nature of his act and that it was wrong. Such proof must be to the satisfaction of the jury beyond a reasonable doubt.

Evidence has been placed before this jury that the defendant Pell has been previously convicted of crime. Such evidence was not received as bearing upon the issues of the case except that you may consider such evidence in connection with all other facts and the circumstances shown in the case in determining how much weight and credibility you will accord the testimony of the defendant Pell, who took the stand as a witness in his own behalf.

The law makes this jury the sole judges of the credibility of the witnesses and of the weight you will accord the testimony given by them. You should give to each witness that degree of credit and effect which in your honest judgment you think it ought to have. In coming to your conclusion as to what weight should be accorded the testimony of any particular witness, you may, and properly should, take into consideration insofar as you are (211) able to do so the manner and appearance of the witness when on the stand, and whether the testimony of the witness be frankly and honestly given, also what, if any, interest or lack of interest a witness may have in the outcome of the case and whether on account thereof the witness has colored in any way the facts related to this jury. If you find that any witness has knowingly testified falsely with respect to any matter material to the issues of the case and concerning which the witness might not reasonably have been mistaken, you may, if you wish, disregard all or any part of the testimony of such witness.

The jury will take the case. When you return, you will first be (211)
asked for your verdict in Case 120-55, and you will be asked for your verdict
as to each of the defendants, — Earl H. Pell, You will then be asked for
your verdict in that case as to Ralph W. Scott, and in response to each
request, your verdict will be guilty as charged or not guilty, as you may
determine. You will then be asked for your verdict in Criminal Case 121-55,
and you will be asked for your verdict as to the defendant Ear. H. Pell, and
your verdict in that case will be guilty as charged or not guilty, as you
may determine.

Do counsel have suggestions?

MR. McLAUGHLIN: I have nothing.

MR. MANSFIELD: I have nothing.

MR. WEIDBERG: None.

THE COURT: The jury may retire. (212)

THE CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE FOREMAN: We have.

THE CLERK: What say you as to the defendant Earl H. Pell in Criminal
Case 120-55?

THE FOREMAN: We find the defendant guilty.

THE CLERK: As to the defendant Ralph W. Scott in Criminal Case 120-55?

THE FOREMAN: We find the defendant guilty.

THE CLERK: What say you as to the defendant Earl H. Pell in Criminal Case
121-55?

THE FOREMAN: We find the defendant guilty.

THE CLERK: Members of the jury, your foreman says you find both de-
fendants guilty as indicted, and that is your verdict, so say you each and all?

(The jurors answer affirmatively.)

UNITED STATES DISTRICT COURT (214)
FOR THE DISTRICT OF COLUMBIA FILED IN OPEN COURT
HOLDING A CRIMINAL TERM FEB 7 - 1955
Term, 19--- HARRY M. HULL, Clerk

Grand Jury Impanelled December 2, 1954, Sworn in December 7, 1954

THE UNITED STATES OF AMERICA	)	Criminal No. 120-55
vs.	)	Grand Jury No. 131-55
Earl H. Pell	)	Robbery (22-2901 D.C. Code)
Ralph W. Scott	)	

The Grand Jury charges:

(214)

On or about January 20, 1955, within the District of Columbia, Earl H. Pell and Ralph W. Scott by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of Clara L. Miller property of Mid-City Liquors, Inc., a body corporate, of the value of about \$95.00 consisting of the following: ninety five dollars in money.

A TRUE BILL:

/s/ Bernard J. Maguire
Foreman.

/s/ Leo A. Rover
Attorney of the United States
in and for the district of Columbia.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

(215)

FILED

FEB 11 1955

HARRY M. HULL, Clerk

UNITED STATES

vs.

Criminal No. 120-55

Earl H. Pell

Charge Robbery

Ralph W. Scott

Defendant

PLEA OF DEFENDANT

On this 11th day of February, 1955, the defendant Earl H. Pell and Ralph W. Scott, appearing in proper person and by ~~his~~ their attorney Carl J. Morano, Esq., being arraigned in open Court upon the indictment, the substance of the charge being stated to him, pleads Not Guilty thereto.

The defendants are remanded to the District of Columbia Jail.

By direction of

/s/ CHARLES E. McLAUGHLIN
Presiding Judge
Criminal Court #1

Present:

United States Attorney

By /s/ Edward Troxell

Assistant United States Attorney

HARRY M. HULL, Clerk

/s/ R. Minier

Official Reporter

By /s/ Wm. Collins, Jr.
Deputy Clerk

FILED

(216)

May 2 - 1955

HARRY M. HULL, Clerk

On this 2nd day of May, 1955, came again the parties aforesaid, in manner as aforesaid, and the same jury as aforesaid in this cause, the hearing of which was respited Thursday, April 28, 1955; whereupon after hearing further of the evidence and the instructions of the Court, the two alternate jurors

are discharged from further consideration in this case. The jury retires (216)
to consider their verdict.

The jury returns into Court and upon their oath say that each defendant
is guilty as indicted. The case is referred to the Probation Officer of the
Court and the defendants are remanded to the District of Columbia Jail.

By direction of
F. Dickinson Letts
Presiding Judge
Criminal Court #2

Judgment and Commitment (Rev. 7-52)

Cr. Form No. 25 (217)

UNITED STATES DISTRICT COURT		FILED
UNITED STATES OF AMERICA	For the	JUN 1 1955
	DISTRICT OF COLUMBIA	HARRY M. HULL, Clerk
UNITED STATES OF AMERICA	)	
v.	)	Criminal No. 120-55
Ralph W. Scott	)	

On this 27th day of May, 1955 came the attorney for the government and the
defendant appeared in person and¹ by counsel, William Mansfield, Esq.

It Is Adjudged that the defendant has been convicted upon his plea of²
not guilty and a verdict of guilty of the offense of

Robbery
as charged³

and the court having asked the defendant whether he has anything to say why
judgment should not be pronounced, and no sufficient cause to the contrary
being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

It Is Adjudged that the defendant is hereby committed to the custody of
the Attorney General or his authorized representative for imprisonment for a
period of⁴

Five (5) years to Fifteen (15) years.

~~XXXXXXXXXXXXXXXXXXXX~~

It Is Ordered that the Clerk deliver a certified copy of this judgment
and commitment to the United States Marshal or other qualified officer and
that the copy served as the commitment of the defendant.

/s/ F. Dickinson Letts
United States District Judge.

Bill Sampson
For Hearing 2/29/56
P. F. B
11:30 am
1st case

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 12,937

RALPH W. SCOTT,

APPELLANT,

v

THE UNITED STATES,

APPELLEE.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Roger D. Fisher

701 Union Trust Building
Washington 5, D. C.

Attorney for Appellant

III. The third question is whether, where there was only scant circumstantial evidence against the appellant and overwhelming direct evidence against the codefendant below, it was error for the court to fail to make any charge as to circumstantial evidence or to point out to the jury the differences in the evidence as between the two defendants.

BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12,937

RALPH W. SCOTT,
APPELLANT,
v.
THE UNITED STATES,
APPELLEE.

APPEAL FROM JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Rule 30

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8, 31

33

8, 31, 33

Wigmore, Evidence, 3d ed.

18

JURISDICTIONAL STATEMENT

The appellant was convicted of robbery at a jury trial held in the United States District Court for the District of Columbia on April 28 and May 2, 1955. (Tr. 1-213). He was sentenced to prison for a period of five to fifteen years. (Tr. 217 , J.A. 54). On September 2, 1955 this Court entered an order permitting appellant to prosecute this appeal in forma pauperis. (Tr. 220 , J.A. —). The District Court had jurisdiction under the Act of June 25, 1948, c. 645, 62 Stat. 826, U.S.C.A., Title 18, §3231, and this Court has jurisdiction under Act of June 25, 1948, c. 646, 62 Stat. 929, as amended by Act of October 31, 1951, c. 655, §48, 65 Stat. 726, U.S.C.A., Title 28, § 1291.

STATEMENT OF THE CASE

One Earl Pell, who was a codefendant in the trial below, had known the appellant for several years (Tr. 119, J.A.

40). From January 1, 1955 to January 20, 1955, Pell had been sharing a room with somebody else. (Tr. 119, J.A.

40). On the morning of January 20, 1955, Pell left that room and arrived at the apartment of the appellant and his wife at 1210 N Street, N.W. (Tr. 122, J.A. 42). Pell was in and out of the apartment during the day, going on errands, providing liquor, and drinking (Tr. 117-142). To help in carrying out one of those errands Pell was given a piece of paper showing the address of the place to which he was to go (Tr. 122, J.A. 42) and the address of appellant's apartment. (Tr. 131, J.A. 44).

Throughout the day Pell was carrying a gun. (Tr. 139, J.A. 45). He had arrived at the apartment by nine or ten o'clock in the morning and had the gun at that time. (Tr. 139, J.A. 45). Sometime after 4:00 p.m. in the afternoon when he was down on New York Avenue Pell noticed that the handle plates to the gun were missing (Tr. 140, J.A. 46). He did not, however, remember leaving them in the appellant's apart-

ment. (Tr. 141, J.A. 46).

There was testimony that sometime around 7:25 p.m. Pell and the appellant were seen together in front of the Commander Restaurant on 13th Street. (Tr. 33, J.A. 9). To facilitate understanding of the geographical evidence a pictorial representation of it is shown on a sketch map at page 3. Pell and the appellant were allegedly seen at point A on the sketch map. A little later appellant was seen alone at point B, at the alley entrance to his apartment. (Tr. 72-73, J.A. 23).

Around 7:30 p.m. (Tr. 30, J.A. 7) or 7:40 p.m. (Tr. 79, J.A. 26) Pell entered the Mid-City Liquor Store at 1216 13th Street. This is shown at point X on the sketch map. Pell was alone. (Tr. 30, J.A. 7). By his own testimony he was drunk and had been taking some kind of drug. (Tr. 112-113).

Pell held up the store at gun point, was given money from the cash register and left. (Tr. 31^{J.A. 8}). The delivery boy followed Pell out of the store, knocked him down and captured him. (Tr. 32^{J.A. 9}). A crowd gathered. (Tr. 90, J.A. 29). The police came and took Pell to the station. In searching Pell the police found the piece of paper giving the appellant's address. (Tr. 99^{J.A. 32}). They were led to believe that Pell was living there. (Tr. 104, J.A. 34).

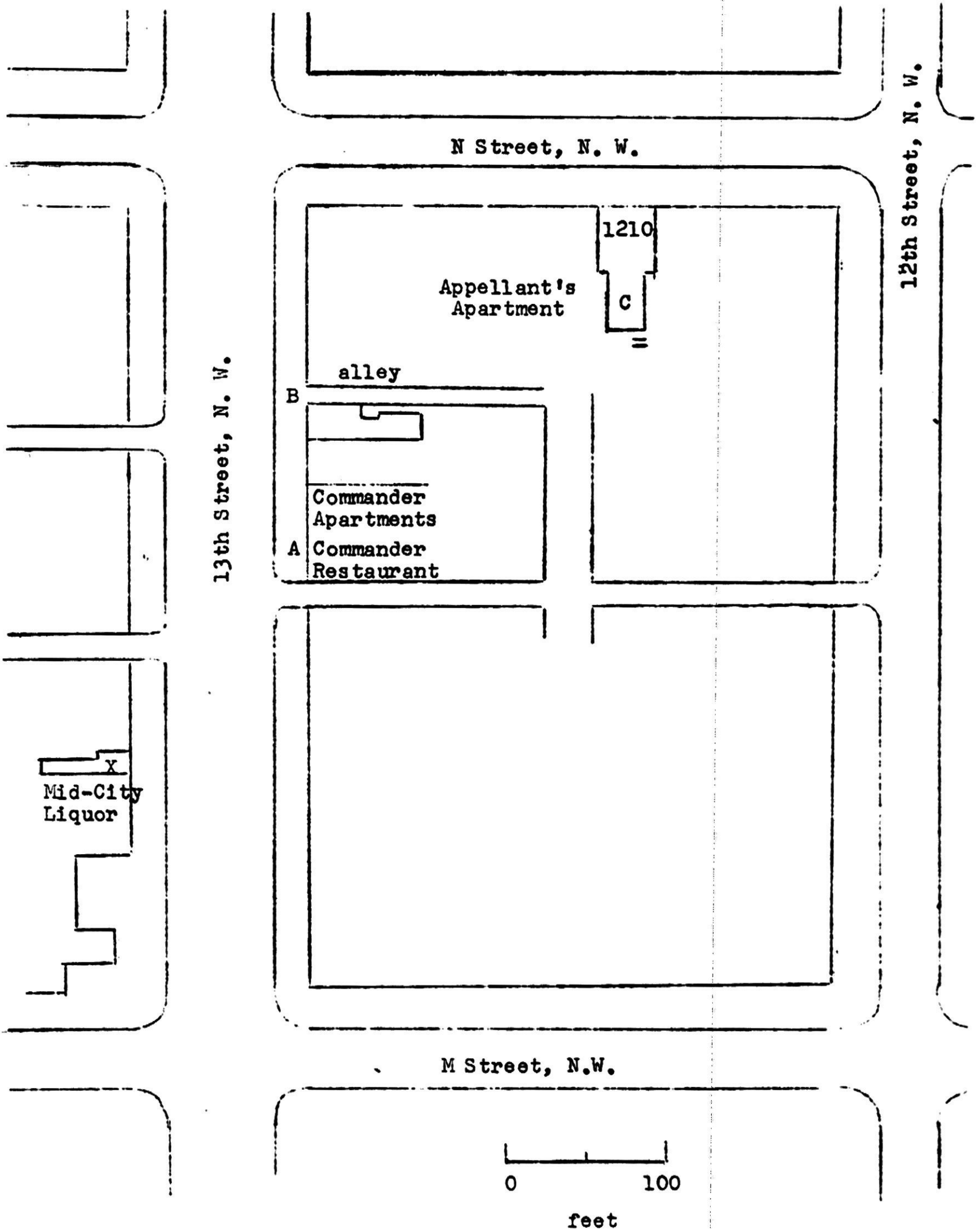
The police went to the apartment reaching there about 8:00 p.m.. (Tr. 101, J.A. 33). They inquired of the landlord if he knew Pell. The landlord said "he didn't know anybody". (Tr. 105, J.A. 35). The police went to the appellant's apartment where they found him shaving. (Tr. 109^{J.A. 37}). They asked him if he knew Pell and if he had been out. (Tr. 106, J.A. 35

). Pell had a criminal record of several prior convictions. (Tr. 144). The appellant said that he did not know Pell and had been home all day. (Tr. 106, J.A. 35). The appellant, who had a regular job, had been home sick that day. (Tr. 120-121, J.A. 41-42).

The police searched the apartment (Tr. 102^{J.A. 33}). They found some objects which were excluded from evidence (Tr. 102, J.A. 33-

PICTORIAL REPRESENTATION OF THE EVIDENCE

SKETCH MAP



37), but which, on cross examination, a police officer said were "a pair of hand grips which fit the gun that Pell had." (Tr. 109, J.A. 37). At another point on cross examination the officer said that they had found the "gun grips" on the dresser top and that "they matched pretty good." (Tr. 106, J.A. 35).

The appellant was arrested for committing the armed robbery with Pell. The two were jointly tried. At the trial Pell's defense was that he was too drunk to know what he was doing and denied any recollection of the evening in question. (Tr. 114-115).

Upon the conclusion of the evidence appellant's counsel below moved "for the dismissal of the action". (Tr. 183^{J.A. 46}). This was construed as a motion for a judgment of acquittal and was denied. (Tr. 184^{195 J.A. 47}). The jury found both Pell and the appellant guilty. (Tr. 212, J.A. 52). The appellant alone has appealed.

STATUTES AND RULES INVOLVED

Act of March 3, 1901, c.854, §810, 31 Stat. 1322, D.C. Code, Title 22, §2901.

Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Act of March 3, 1901, c. 854, §908, 31 Stat. 1337, D.C. Code, Title 22, §105.

In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore ap-

plicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

Federal Rules of Criminal Procedure, Rule 14:

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Federal Rules of Criminal Procedure, Rule 52(b):

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT OF POINTS

- I. The evidence being circumstantial and there being no evidence of some fact or combination of facts which, by a deductive process not involving guess or speculation, could fairly exclude the hypothesis of innocence it was error to deny the motion for judgment of acquittal.
- II. The joint trial below, in which the codefendant falsely denied any recollection of the crime, resulted in a miscarriage of justice which this court, in its discretion, should correct by setting aside the conviction and ordering a new trial.
- III. The failure of the court below to give any instructions as to circumstantial evidence substantially prejudiced the rights of the appellant, in view of the scant and wholly circumstantial evidence presented against him and the overwhelming direct evidence presented against the codefendant below.

SUMMARY OF ARGUMENT

I. Sufficiency of the evidence.

There was no direct evidence that appellant participated in any way in the crime. The only evidence relating to appellant was circumstantial. This being so, the rule is that to support a conviction the evidence must be such as to warrant the jury to conclude that it is inconsistent with every reasonable hypothesis but that of guilt. The circumstances in this case fall far short of that standard: -

The circumstance of Pell's having appellant's address in his possession was explained by uncontradicted testimony.

The circumstance of pistol grips that fitted Pell's gun being found in the apartment which both Pell and the appellant had occupied during the day was explained by uncontradicted testimony.

The testimony that appellant denied knowing Pell and said that he had been at home all day is as consistent with innocence as it is with guilt. Appellant may simply have not wanted to get involved.

The circumstance that appellant and Pell were seen together in front of the Commander Restaurant on the other side of the street and up a ways from the scene of Pell's subsequent robbery is as consistent with appellant's innocence as it is with guilt. The location is in the same block as appellant's apartment. Any inference as to criminal incitement or plotting is purely speculative and cannot overcome the presumption of appellant's innocence.

The testimony that appellant was seen alone prior or about the time of the robbery at the alley which leads to his apartment places him so far from the scene of Pell's crime that it provides no evidence of guilt.

Taking all the evidence together no jury could reasonably conclude that that evidence excludes every reasonable hypothesis of appellant's innocence.

II. Miscarriage of justice resulting from joint trial.

Appellant was tried jointly with Pell below. Pell, in an effort to establish a defense of drunkenness, falsely denied any recollection of the evening of the crime. But for the fact that he was on trial himself at the same time it appears that Pell would have then, and would now honestly testify that the appellant had no part in the crime.

This issue was not raised below. The court, in its discretion, should order a new trial under

Rule 14 and Rule 52(b) of the Federal Rules of Criminal Procedure.

III. Instructions to the jury.

At the trial below there was scant and wholly circumstantial evidence against the appellant and overwhelming direct evidence against Pell. The court failed to point this out and failed to make any charge as to circumstantial evidence or the necessity for the jury to find that that evidence excluded any reasonable hypothesis of innocence. The jury may well have thought that if they believed the testimony as to each defendant they should find him guilty. Under the circumstances the failure to charge was substantially prejudicial to the rights of the appellant and a new trial should be ordered though the instruction was not requested below.

ARGUMENT

I

SUFFICIENCY OF THE EVIDENCE

1. There was no direct evidence that appellant participated in any way in the crime of which he has been convicted.

There was no evidence that appellant committed or participated in any criminal act. Any conclusion of guilt must be based on inferences from circumstantial evidence.

Not only is there no direct evidence, but the very lack of it constitutes evidence of innocence. There were several eye-witnesses to Pell's robbery of the liquor store. There must have been quite a few people on the street, for the police testified that when they arrived at 7:40 p.m. there was a crowd around Pell which had to be separated. (Tr. 91^{JA.29}). The police took the names of some of these people. (Tr. 90-91^{JA.29}). If appellant had been standing outside the liquor store as a lookout for Pell or to assist in his escape it might be expected that there would be some testimony to that effect. There was none. On the contrary, the testimony was that his landlady had seen him up the street and on the other side near where he lived.

2. For circumstantial evidence to support a verdict of guilty there must be evidence of some fact or combination of facts which to a reasonable mind fairly excludes the hypothesis of innocence.

In Curley v. United States, 81 App. D.C. 389, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947) this Court discussed at length the standard to be applied in reviewing a conviction based on circumstantial evidence. Since that time this Court and others have followed the standard there laid down. The discussion that follows is not intended to derogate from the principle of law decided in the Curley case but rather to clarify that rule and perhaps aid the Court in its application.

It has often been stated that in order to support a conviction, circumstantial evidence must exclude every reasonable

hypothesis other than guilt. E.g., Anderson v. United States, 30 F.2d 485, 487 (5th Cir. 1929).

It has been held reversible error to fail to so charge the jury. E.g. Stutz v. United States, 47 F.2d 1029 (5th Cir. 1931). The Supreme Court has more recently held that where a jury is properly instructed on the standards for reasonable doubt it may not be reversible error to fail to make a special charge on circumstantial evidence. Holland v. United States, 348, U.S. 121, 139-140 (1954). The rule, nevertheless, remains as a proper standard to guide the jury.

The burden of the Curley opinion was to separate the role of the jury from the role of the judge. Under that decision the jury should decide whether in their minds the evidence to which they give credence excludes every reasonable hypothesis of innocence. The judge should decide whether the evidence to which the jury might have given credence could, through the operation of reason, have been considered to exclude every reasonable hypothesis of innocence.

Two differences between the standard for the jury and the standard for the judge must be noted. The first is that the jury should be instructed to take into account only the evidence to which they in fact give credence. The judge, on the other hand, must take into account all the evidence to which the jury might have given credence. This, in itself, gives the jury a substantial role and means that the court is not simply doing again what was in the province of the jury.

The second difference is the one under discussion. The jury should be instructed to decide whether in their opinion the evidence excludes every reasonable hypothesis of innocence. If the jury finds that in their opinion it does, then the issue on appeal is whether a jury, through the application of reason, could have so concluded. It is the precise formulation of this last test which merits study.

In the Curley case the Court quoted from Hammond v. United States, 75 App. D.C. 397, 127 F.2d. 752, 753 (1942) and then explained the meaning of that language.

The first part of the Hammond quotation was as follows:

"Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused" As quoted in Curley v. United States, 81 App. D.C. 389, 392, 160 F.2d 229, cert. denied, 331 U.S. 837 (1947).

The Curley case explained this as follows:

"To be valid, the first part of the above quoted statement from the Hammond case, supra, must be understood to mean that the judge cannot let a case go to the jury unless there is evidence of some fact which to a reasonable mind fairly excludes the hypothesis of innocence." 81 App. D.C. at 393, 160 F.2d at 233.

This, it is submitted, is a correct and unambiguous statement of the standard to be applied by this court.

The second part of the Holland quotation is as follows:

". . . and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him." As quoted in 81 App. D.C. at 392, 160 F.2d at 232.

This rule was explained in the Curley case in the following language:

"The second part of the quoted statement means that if, upon the whole of the evidence, a reasonable mind must be in balance as between guilt and innocence, a verdict of guilt cannot be sustained." 81 App. D.C. at 393; 160 F.2d at 233.

This, it is submitted, implies an unduly harsh rule. It is not only when the reasonable mind must be in balance as between guilt and innocence that a verdict of guilty cannot be sustained. Whenever the reasonable mind must still find some hypothesis of innocence consistent with the evidence then also a verdict of guilty cannot be sustained.

One further clarification might be suggested. This is as to the phrase "the reasonable mind". Although a reasonable man sometimes reaches conclusions on the basis of guess and speculation, no verdict which requires guess or speculation can be sustained. Levy v. Vaughan, 42 App. D.C. 146 (1914); Kenney v. Washington Properties, 76 App. D.C. 43, 128 F.2d 612 (1942). The conclusion which excludes every reasonable hypothesis of innocence must be reached by deduction, not

intuition or hunch. As stated in a recent case in the Fifth Circuit, which was applying the same standard as that of the Curley case, the question is:

"Was then the jury warranted in deducing from the evidence inferences which excluded every reasonable hypothesis but that of guilt." Vick v. United States, 216 F.2d 228, 232 (5th Cir. 1954).

There are many ways of phrasing this standard. The fact that one formulation is correct does not mean that another may not be equally correct. The search should be for that phrasing of the rule which is most logical, most precise, and easiest of application.

The rule might be stated that a conviction will be sustained whenever a reasonable mind might not have a reasonable doubt. This would be correct, but fairly fuzzy and leaving a lot of room for differences of opinion.

The formulation suggested in Thomas v. United States, 93 App. D.C. 392, 211 F.2d 45, cert. denied, 347 U.S. 969 (1954) is somewhat better. There it was suggested that a conviction be sustained whenever the evidence, without conjecture, will permit the conclusion of guilt beyond reasonable doubt within the fair operation of a reasonable mind. Here the phrase "without conjecture" provides a firm and clear concept. It is not so clear whether the "fair operation of a reasonable mind" is to qualify that so as to allow some conjecture or is to further restrict conjecture. Would the test be more or less strict if the phrase were deleted?

The established rule as to circumstantial evidence and the concept of a reasonable hypothesis of innocence are helpful and should not be abandoned. It is only necessary, as pointed out in the Curley case, to have the court consider itself reviewing a logical application of the rule by the jury rather than applying the rule afresh itself.

From a study of the cases and the various formulations of the rule the following two-sided test is suggested as the standard to be applied in reviewing convictions based on circumstantial evidence. It is submitted that it has a greater

clarity of concept and ease of application than some of the other equally correct formulations of the same standard.

To support a conviction there must be evidence of some fact or combination of facts which by a deductive process not involving guess or speculation could fairly exclude the hypothesis of innocence. Whenever the reasonable mind must still find some hypothesis of innocence consistent with the evidence a verdict of guilty cannot be sustained.

Although it is believed that this formulation states precisely the standard as accepted by this Court it is not necessary that the Court adopt it in order to reverse the conviction in this case. It would appear that there is insufficient evidence to sustain the conviction under any formulation of the standard.

3. The testimony that Pell had the address of appellant's apartment in his pocket has no probative value.

The "evidence" that led to appellant's arrest was that the actual robber, Pell, had the address of appellant's apartment in his pocket. (Tr. 99^{J.A. 32}). The police understood that that apartment was where Pell also was staying. (Tr. 104-105, J.A. 34). In fact he had been staying there at least for that day. (Tr. 122-134). Certainly it is no evidence of criminal conduct by appellant that Pell had the address of that apartment in his pocket.

Not only was the piece of paper harmless in itself, but its purpose was specifically explained by Pell on the stand. The prosecution brought out on cross examination of Pell that he had been drinking a great deal and that he had been sent on an errand by the appellant who was sick. (Tr. 121, J.A. 41-42). With regard to this errand the following questions were asked by the Assistant United States Attorney and answered by Pell:

Q. How were you able to find the place where Scott's boss was?

A. He gave me a piece of paper. (Tr. 122, J.A. 42).

Q. You mean to say this man gave you \$15, belonging to Scott and you were drunk?

A. Yes, Sir.

Q. All right, now, after you got the \$15, where did you go?

A. To his house.

Q. How were you able to find your way back to his house?

A. I had the address there on the paper.
(Tr. 131, J.A. 44).

Here is a full explanation as to which no question was raised at the trial. It would have been unwarranted speculation for the jury to dismiss this explanation and guess at some other, more sinister conclusion regarding that address.

No inference can be made from the fact that the address, as described by the police, said, "Enter through the rear"
^{J.A. 32}
(Tr. 99), or "Use rear entrance" (Tr. 104, J.A. 34). As indicated by the testimony of the police, that is the front door of the apartment, the inside door through the building coming into the kitchen. (Tr. 101-102, J.A. 33).

In view of the government's unexplained failure to offer the piece of paper into evidence every inference as to what it would show must be taken against the government. Morel v. United States, 127 F.2d 827 (6th Cir. 1942).

The testimony that Pell had appellant's address in his wallet provides no evidence either by itself or in conjunction with the testimony as a whole, which would justify any inference of appellant's participation in Pell's subsequent crime, and must be ignored.

4. The testimony that the police found a pair of hand grips at 1210 N Street that fitted Pell's gun was fully explained and warrants no inference of guilt of the appellant.

At the trial below the government offered in evidence pieces of a gun found in a search of the apartment at 1210 N Street. The defense objected on the ground that the pieces would fit any .38 caliber revolver and that there was nothing

to identify them as a part of the gun that Pell had. (Tr. 102, J.A. 33).

The Assistant United States Attorney told the Court:

" . . . I can't say that they are specifically fitting the gun, but it is just a circumstance . . ." (Tr. 102-103, J.A. 34).

The Court sustained the objection and the offered exhibit was never admitted in evidence.

Subsequently, in answer to a question on cross examination, one of the police officers testified as follows:

"First of all, we found a pair of gun grips on his dresser top, and the gun I took off Pell didn't have any gun grips. They matched pretty good." (Tr. 106, J.A. 35).

The same police officer later, still under cross examination, stated:

" . . . I found a pair of hand grips which fit the gun that Pell had, . . ." (Tr. 109, J.A. 37).

The fact that a pair of hand grips to a pistol was found at the apartment at 1012 N Street, in the light of the other evidence presented, provides no evidence of appellant's guilt.

In the first place there is the point that was made below: the plates would presumably fit any gun of a similar make. Nothing was offered to warrant the conclusion that they had any connection with Pell's gun. The fact that the prosecution did not offer to connect the exhibit with Pell's gun may justify the inference that there was in fact nothing to connect these grips to that gun.

But even assuming that the testimony that the grips fitted the gun would justify an inference that they were connected with the gun, the presence of the grips in the apartment was explained. The following excerpts from the prosecution's cross examination of Pell show that Pell had the gun when he went to Scott's apartment in the morning and that he first noticed that the grips were missing after leaving the apartment in the afternoon:

Q. Well now, you first went up to get the money about 9:00 or 10:00 o'clock in the morning, didn't you?

A. Yes, that is right.

Q. Isn't that the time you gave Mr. Scott the money?

A. That is right.

Q. Isn't that the time you found the gun in your pocket?

A. Yes, sir. (Tr. 139, J.A. 45).

* * *

Q. Where are the handles here, the plates?

A. I don't know where they are.

Q. Did you have them in your possession at any time?

A. I missed them when I got on New York Avenue and reached in the pocket, and I found the handles wasn't on there.

Q. When is the last time you saw the gun with the handle plates on?

A. I don't remember.

Q. Before you got to New York Avenue?

A. No. I didn't look until I got to New York Avenue, but I told you when I reached in my pocket to give the boy some money to get some wine, I found out that I had the pistol in my pocket.

Q. Well now, that is the second time?

A. Yes.

Q. You say at that time that the plates were off the handle?

A. Yes, sir, I remember them being off.

Q. You remember leaving them at Scott's house?

A. No, sir. (Tr. 140-141, J.A. 46).

In the light of this testimony there is of necessity a reasonable inference that sometime during the day the grips came off Pell's gun while he was in Scott's apartment.

Certainly it would be contrary to the evidence to make any inference as to the appellant's guilt because of the presence of those grips in the apartment. What is the inference that might be drawn? That the appellant provided Pell with a gun to commit the robbery? This is directly contrary to all the evidence. Pell had the gun in his pocket from nine o'clock in the morning until at least 4:00 p.m.. It would be un-

warranted speculation for a jury to ignore all the testimony and conclude, from the bare statement as to pistol grips, that appellant furnished the gun to Pell to commit a robbery. It would be heaping inference upon inference to conclude that the appellant was, because of the grips, participating in a robbery committed 10 hours after Pell acquired the gun.

Circumstantial evidence that is explained proves nothing. In Cooper v. United States, 94 App. D.C. 343, 218 F.2d 39 (1954) the appellant's finger prints were found on the get-away car after a robbery. This Court pointed out that this was explained by the fact that appellant frequently drove the car and was in fact, paying for it. The conviction there was reversed.

Pell's uncontradicted testimony brought out in detail by the government on cross examination explains that Pell had the gun earlier in the morning and suggests that the pistol grip plates came off sometime during the day while he was in the apartment. In the face of this testimony the presence of the pistol grip plates warrants no inference whatsoever of guilt on the part of the appellant. The government itself suggested that the grips had been left at Scott's apartment (Tr. 141, J.A. 46). There is a necessary inference that they had been so left which deprives this evidence of any probative value.

5. That the appellant may have lied to the police about not knowing an ex-convict and about being home is as consistent with innocence as with guilt.

Pell had been convicted of breaking and entering in 1926, of larceny in 1942, of impersonating a Federal officer in 1943 and of larceny and breaking and entering in 1948. (Tr. 144). The appellant had known Pell for several years (Tr. 119, J.A. 40) and presumably knew his record.

The police testified that when they entered appellant's apartment without a warrant at eight o'clock at night and

arrested him appellant told them that he did not know Pell and had been home all day. (Tr. 106, J.A. 35). There was no testimony as to what words had been used by the appellant. No great reliance should be placed on recollection testimony of oral utterances. Wigmore refers to the "great possibilities of error" in such testimony and to the likelihood that a slight change in phraseology may completely change the effect of what was said. Wigmore, Evidence, 3d ed. Vol. VII p. 468, §2094.

On appeal it must be assumed that the appellant did deny knowing Pell. But this may have been done in any number of ways which merely indicated a desire not to get involved. The landlord, according to the testimony of the same policeman, said that "he didn't know anybody." (Tr. 105, J.A. 35). Certainly this was a false statement to the police and just as certainly it is no evidence whatsoever that the landlord was guilty of any crime. Appellant may well have said something of the same sort. Appellant, because he knew Pell as well as he did, may have thought it wise to deny acquaintance with this ex-convict. Unfortunately there are many in the community who do not consider absolute candor with the police a compelling duty.

Appellant was also said to have told the police that he had been home all day. (Tr. 106, J.A. 35). It is suggested that the appellant had been seen outside the apartment on 13th Street, that the appellant was therefore lying, that he would not lie unless he had a guilty conscience, and that if he had a guilty conscience he committed the robbery with Pell. This is building inference on inference - and all on a weak foundation.

There was uncontradicted testimony that appellant had a job but had been home sick on the day in question. (Tr. 121, J.A. 41-42). We do not know precisely what the appellant said to the police or whether the statement that he had been home all day merely meant that he had not been at work. There was no testimony that appellant had been away from the apartment

for more than a few minutes nor further from the apartment than about half a block. It is likely that a statement such as "I've been around here all day" would be considered a lie by the police although honestly made by the appellant.

The alleged denials made by the appellant to the police could reasonably have been made by anyone under the circumstances whether innocent or guilty of the crime. Wrongfully to deny acquaintance with an ex-convict is not proof of participation with him in a robbery. In fact, to make untruthful statements to the police before having a chance to talk with counsel has been held to provide no proof whatever of guilt. People v. Zamora, 66 Cal. App. 2d 166, 152 P.2d 180 (1944).

In another case the appellant went to a cousin, told her he was in trouble, and asked her to tell all inquirers that she had been with him in North Carolina on the day of the robbery. She had not in fact been in North Carolina that day. The Court commented on this request as follows:

" . . . it is explained by terrorized innocence as well as by a sense of guilt. After all, innocent people caught in a web of circumstances frequently become terror-stricken." Cooper v. United States, 94 App. D.C. 343, 345, 218 F.2d 39, 41 (1945).

There was testimony that appellant had told the police he did not know Pell and had been home all day. From this fact appellant's guilt of armed robbery is not the only reasonable inference. A reasonable mind could not exclude the hypothesis that appellant's statements to the police were motivated simply by a desire to stay out of trouble.

6. That appellant was said to have been seen with Pell in the same block as appellant's apartment some distance away and on the other side of the street from the store later robbed by Pell is consistent with appellant's innocence and does not provide proof for a verdict of guilty.

The only evidence in the case that might be said to justify an inference that appellant had anything to do with

the crime was the testimony of Mr. Miller that he had seen the appellant with Pell on 13th Street shortly before the holdup. The balance of the evidence merely confirms the conceded fact that appellant knew Pell and that they had spent a large part of the day drinking together. What does the testimony of Mr. Miller add to that?

For the purposes of the discussion it has been assumed that Mr. Miller did in fact see Pell and the appellant together on the east side of 13th Street five or ten minutes before the holdup. It might be well to point out, however, that perhaps no jury could reasonably have believed his testimony.

Mrs. Miller owned the liquor store that was held up. (Tr. 29). Mr. Miller first testified that between the hours of 7:00 and 8:00 that evening he had been in the liquor store (point X on the sketch map at page 3). (Tr. 29, J.A. 7). On cross examination he said he had not been in the store but had been out doing an errand at about 7:20 when he saw the appellant and Pell in front of the Commander Restaurant. (Tr. 42).^{J.A. 10}

Mr. Miller testified that he had seen appellant before as a customer who had been in the store quite often. (Tr. 43).^{J.A. 10} At the time of Pell's arrest, however, when Mr. Miller discussed the crime with the police he made no mention of having seen anyone with Pell. (Tr. 48-49, J.A. 13).

Mr. Miller never picked the appellant out of a line-up. (Tr. 47-48, J.A. 13). Mr. Miller came into the precinct house, saw the appellant alone in one room and Pell in another, and subsequently told the story of having seen them together before the robbery. (Tr. 48, J.A. 13).

Mr. Miller testified that the appellant was wearing in the precinct the same clothes that he had been wearing on the street, and that the appellant had been wearing a light-colored dress shirt with a tie. (Tr. 49, 54).^{J.A. 13, 15} The police

records showed that appellant had actually been wearing a maroon shirt and no tie. (Tr. 179).

It would appear that these conflicts and inconsistencies raise a reasonable doubt by themselves. But such a holding is not necessary. Assuming that the jury was entitled to believe beyond a reasonable doubt that appellant and Pell were talking together in front of the Commander Restaurant, this is still not proof that appellant participated in the crime.

What is indicative of guilt on appellant's part? To be seen talking with Pell is not evidence of any guilt of the appellant of a crime subsequently committed by Pell. Guilt by association has not been taken that far. The only thing that adds a color of evidence is the location of that conversation on the other side of the street and part way up the block from the liquor store that Pell later held up. If the conversation and the subsequent holdup had taken place on the other side of town from where appellant lived, additional inferences might be reasonable. But appellant was talking to Pell (if he was) in the same block where the appellant lived. He was talking to Pell three doors down from the alley entrance to the apartment where the appellant lived.

As discussed above the entrance into appellant's apartment from N Street through the building comes into the kitchen. (Tr. 102). ^{J.A. 33} This is the "back door" of the apartment. (Tr. 105, J.A. 35). The entrance from the alley was the one which the appellant suggested people use, as indicated by the paper he gave Pell. (Tr. 131, J.A. 44 ; Tr. 104, J.A. 34).

The alley entrance from 13th Street was thus the main entrance to the apartment. The appellant was reportedly seen with Pell at point A on the sketch map at page 3, three doors down from this entrance. The fact that Pell later held up a store on the other side of 13th Street cannot add

sinister connotations to appellant's conversation with Pell so near the appellant's own apartment.

Any inferences of guilt from the alleged conversation with Pell would have to depend upon guess and speculation as to what was said. In view of the fact that there was no evidence of actual participation in the crime by the appellant his conviction can be sustained only if it can be deduced that he was encouraging or inciting Pell to commit the crime. But the presumption is that the appellant is innocent. From the fact of conversation alone and the subsequent conduct of Pell one cannot, by deduction, exclude the hypothesis of appellant's innocence.

They might have been talking about anything. Of a thousand possible topics only one would be consistent with guilt - the balance consistent with innocence. Even if one speculated that Pell may have been suggesting the possibility of holding up the liquor store, it is a fair hypothesis that the appellant said he would have nothing to do with such a venture and walked away. The appellant's subsequent conduct would make such an inference more likely than that he and Pell were partners in a holdup -- a holdup in which the appellant did nothing.

To discuss the possibilities is to demonstrate that they are based on guess and speculation. It is submitted that the fact of this conversation, if it must be taken as a fact, cannot form the foundation for a reasoned exclusion of the hypothesis of innocence. A reasonable mind could not help but find some hypothesis of innocence consistent with this evidence.

Although every case of this kind is governed by its own facts, analogies are sometimes helpful. In Johnson v. United States, 195 F.2d 673 (8th Cir. 1952) the appellant was charged with participating in the crime of transporting a stolen car across

state lines. The evidence showed that he had been riding in the car while it was driven across a state line with the police in pursuit shooting at the car. The appellant was not the driver. The court held that there was not sufficient evidence for the jury to have found beyond a reasonable doubt that the appellant was aiding or abetting in the commission of the crime:

"The circumstances proved in this case are not inconsistent with defendant's innocence and mere suspicion or conjecture is not sufficient to sustain a conviction." 195 F.2d at 676.

Another recent case holding that suspicious circumstances are not enough to support a conviction is Vick v. United States, 216 F.2d 228 (5th Cir. 1954). The crime involved was having in one's possession an unregistered still and working at an unregistered still. In that case, as in the instant case, those clearly guilty of the crime were associated with the appellant; there they were his brother and nephew. In that case, as in the instant case, the appellant was seen not far from the scene of the crime; there he was sitting about 10 or 15 feet from the still. In that case, as in the instant case, the appellant's conduct toward the police might have indicated a guilty conscience; there he actually ran away from the arresting officers.

The court, adopting the standard used in the Curley case, stated the issue:

"Was the jury warranted in deducing from the evidence inferences which excluded every reasonable hypothesis but that of guilt?" 216 F.2d at 232.

The court held that the jury was not so warranted and reversed the conviction.

Every case must be considered on its own facts, but the principle is clear. The jury must be entitled to deduce from the evidence that there is no reasonable hypothesis of innocence. Where the evidence is that two men were seen talking on the street, and one later held up

a store, no process of deduction will exclude the possibility that the other man is innocent. His innocence can only be precluded by unfounded guesses and conjectures as to what the men were talking about.

7. Mrs. Palmer's testimony that the appellant was at the alley entrance to his apartment at 7:35 p.m. is not only consistent with appellant's innocence but raises inferences inconsistent with his guilt.

Mrs. Palmer, appellant's landlady, testified that she saw the appellant standing at the alley two doors above the Commander Apartments at around 7:35 p.m. on the evening in which Pell held up the liquor store. (Tr. 71, J.A.

22). This is at point B on the sketch map at page 3.

Two aspects of this testimony require considerations: the place and the time. It is clear from the questioning of Mrs. Palmer by the Assistant United States Attorney that he expected her to testify that the appellant was standing at the other alley just south of the Commander Restuarant and more nearly across the street from the liquor store. (Tr. 72-73, J.A. 22-23). Mrs. Palmer's testimony on this point, however, was unequivocal. She was coming "up" 13th Street from M Street and saw the appellant at the alley that is "about two doors above" the Commander Apartment building. (Tr. 71-73, J.A. 22-23). As pointed out above, this is at the alley that leads to the main door of the appellant's apartment, marked C on the sketch map. In effect, her testimony is that appellant was seen standing at the end of his front walk. To be seen standing at such a place cannot become evidence of guilt simply because a store half a block away and on the other side of the street is held up.

What is the reasonable inference? The appellant was too far away to be a useful lookout. In fact the point where he was seen has no such geographical relationship to the scene of the crime as to justify any rational deduction connecting the two. Certainly, to be seen

standing on your own front walk is not evidence of committing a crime somewhere else. No reasonable mind could conclude that to be seen standing there was consistent only with guilt and inconsistent with innocence.

The second aspect of Mrs. Palmer's testimony requiring consideration is the question of the exact time when the appellant was seen, in relation to the time when Pell was holding up the liquor store down at 1216 13th Street. Mrs. Palmer said she saw the appellant at 7:35 p.m. (Tr. 71, J.A. 22). The time of the holdup was variously given as "just a little before 7:30" (Tr. 30, J.A. 7), and "about 20 minutes to 8:00". (Tr. 79, J.A. 26). The police said that they reached the scene "about 7:40 p.m." (Tr. 90, J.A. 29). In view of this conflict the jury might conceivably have found that Mrs. Palmer saw the appellant just before the robbery, during the robbery or just after the robbery. Each possibility must be considered.

If the appellant were seen at the alley entrance to his apartment just before the robbery there is the necessary reasonable inference that he did not participate in it. He had been talking with Pell down the street a few minutes earlier. (Tr. 33, J.A. 9). He left Pell and was then seen at the alley entrance to his apartment by Mrs. Palmer; and then returned to his apartment. It would be unwarranted speculation not supported by a bit of evidence to conclude that the appellant went back down the street to join Pell in committing a robbery.

The second alternative is that the appellant was standing where he was at the time the robbery was being committed. Mrs. Palmer's testimony must then be considered as evidence for the appellant for it places him a long way from the scene of the crime. It was dark and a winter evening (January 20, 1955). 13th Street is wide and busy. Appellant was on the other side of the street and about half a block away. He could have been performing no part

A well, somewhere between I would say 7:30 and 8:00 o'clock, 8:15, or of the robbery. He was much too far away to be a lookout. He was not waiting in a car to aid in an escape nor does there appear to be any other reasonable hypothesis of a role he was playing. None other was suggested by the prosecution. Certainly participation in the crime is not the only reasonable hypothesis, and no jury should be allowed to so find.

The final possibility is that Mrs. Palmer saw the appellant just after the crime was committed. This alternative seems the least likely in view of the fact that Mrs. Palmer made no mention of the large crowd that gathered around the captured Pell or of the arrival of the police. (Tr. 90, J.A. 29). It is also an assumption, however, which provides no evidence damaging to the appellant. A robber is captured, a crowd gathers, the police come, presumably with sirens screaming, and a man is seen standing at the end of his front walk. Evidence of absolutely nothing.

In short, whether Mrs. Palmer's testimony is taken as referring, to before, during, or after the robbery there are necessary inferences consistent with the appellant's innocence. No reasonable juror could conclude that Mrs. Palmer's testimony precluded all reasonable hypotheses of appellant's innocence.

8. The cumulative total of the evidence presented provides no rational basis for excluding every reasonable hypothesis of innocence.

In some cases the cumulative total of the evidence presented may reasonably exclude all hypotheses of innocence although no one bit of evidence by itself does. A combination of circumstances may remove doubts not laid to rest by any one circumstance. Could that be true in this case?

The answer is "no". The cumulative total of circumstantial evidence is greater than the sum of its parts

where one item of evidence precludes a hypothesis of innocence relied upon as consistent with another item of evidence. That is not the case here. There are reasonable hypotheses of innocence consistent with all the evidence.

To be sure, it is the combination of circumstances which undoubtedly led the court below to allow the case to go to the jury. But the circumstances, taken as a whole, warrant closer inspection. Would the appellant's innocence be such an unusual coincidence as to warrant the jury to ignore that possibility?

To ask the question is to answer it. Taking as true all the evidence against the appellant, and the reasonable inferences therefrom, the appellant and Pell had been spending the bulk of the day together, corroborated by Pell's having left the plates of his pistol there and by Pell's having the appellant's address in his pocket. Pell had a criminal record and was the type with whom anyone might deny acquaintance when first asked by the police.

The appellant was seen on the street with Pell a few doors down from the alley leading to the appellant's apartment, and later seen at the alley itself before returning to his apartment. The combination of circumstances presents nothing unusual or anything in the least way indicative of criminal conduct on the appellant's part. The single circumstance that lends any color of guilt to the appellant is action taken alone by Pell. Shortly after leaving the appellant, Pell held up a liquor store in the neighborhood.

The appellant is not his brother's keeper. One cannot deduce backwards from Pell's subsequent conduct that the appellant is a criminal. It is not so unusual or unlikely that a man might commit a crime shortly after leaving an acquaintance that a jury may conclude beyond

a reasonable doubt that the acquaintance also committed the crime.

That, consistent with the evidence, the appellant might conceivably have been urging Pell to commit robbery cannot be denied. On the other hand he might with equal or greater likelihood have been urging Pell not to commit robbery. With still greater likelihood is the chance that they were discussing something else -- Pell having said nothing of his intentions or having formed them after the appellant left. Certainly the bungled execution of the robbery indicated no well-layed plan. And the appellant's lack of any role in the execution suggests no knowledge or participation on his part.

"Wherever a circumstance relied on as evidence of criminal guilt is susceptible of two inferences, one of which is favorable to innocence, such circumstance is robbed of all probative value and is insufficient to support a judgment of guilt." Calvaresi v. United States, 216 F.2d 891, 905 (10th Cir. 1954), reversed on other grounds, 348 U.S. 961 (1955).

The Court's attention is again called to the case of Cooper v. United States, 94 App. D.C. 343, 218 F.2d 39 (1954). The circumstances there are quite parallel to those of the present case. Indeed there was perhaps more cause for suspicion there since there was clear evidence that more than one person had in fact committed the robbery. The combination of circumstances, however, was consistent with innocence and the conviction reversed.

Taken individually or taken as a whole the circumstances presented as evidence below are necessarily consistent with the reasonable possibility that the appellant was innocent of the crime. No rational process starting from the evidence and from the presumption of innocence, could deduce guilt. The reasonable mind must still find some fair hypothesis of innocence consistent with the evidence.

II

MISCARRIAGE OF JUSTICE RESULTING FROM JOINT TRIAL

The joint trial below resulted in a miscarriage of justice which this court in its discretion should correct by setting aside the conviction and ordering a new trial.

As pointed out above, there was very little evidence offered against the appellant. It is quite likely that if Pell, the codefendant below, had testified that he had committed the robbery alone and that the appellant had nothing to do with it, there would have been no evidence to support a jury finding to the contrary. It would then have been necessary for the court to enter a judgment of acquittal. The appellant was deprived of this evidence in the trial below. In a futile effort to save his own skin Pell declined to testify as to the robbery and as to appellant's non-involvement in it. Pell based his defense on the ground that at the time of the robbery he was too drunk to know what he was doing. In support of this position Pell took the stand and denied any recollection of any events between late afternoon of the day in question and when he woke up in the District General Hospital. (Tr. 114). The jury's verdict as to Pell indicates that they did not believe his testimony. There is now reason to believe that at a new trial Pell would admit that he committed the robbery and state that he was alone in committing it. 1/

1/ On July 27, 1955, Pell executed the following affidavit:

"To Whom it may concern:

I, Earl H. Pell, after being first duly sworn in oath depose and say that the following statement is true, So Help me God:

On or about January 20, 1955, in the presents of Pvt. John Georgantis, M.P. at #2 Police Precinct, I Earl H. Pell did confess to this Robbery, and further stated that I was alone at the time.

Further in the Case #CC 120-55 on or about June 13, 1955, I testified in open Court that I was alone at the time of Robbery. (Sic) [con't on next page]

Knowledge that Pell was lying at the time of the trial can hardly fall into the category of newly discovered evidence. The appellant had every reason to believe, as did the jury, that Pell in fact remembered what was going on at the time of the crime. In view of Pell's defense that he was too drunk to remember there was, however, no way in which the appellant could prevail upon Pell in the same trial to testify to the truth, namely that he did remember and that the appellant had no part in the crime. Under these circumstances, as a consequence of the joint trial the appellant was deprived of the honest testimony of the single witness who could unequivocally clear him of the crime.

No motion for a separate trial was made below nor does it appear that appellant below made a motion for a new trial.^{2/}

(1/ con't from p. 29)

I, Earl H. Pell have stated everything and being of sound mind and no fear of bodily harm, agree everything I have stated is true, so help me God.

Respectfully submitted

/s/ Earl H. Pell

Sworn to and subscribed before me this 27th day of July, 1955.

/s/ Edward T. Flanagan"

^{2/} Court-appointed counsel at the trial below was perhaps as inexperienced in criminal trials as present court-appointed counsel is in criminal appeals. Throughout the two day trial he made one single objection. (Tr. 102, J.A.). He made no request for instructions. The evidence against the appellant as to Pell's having the appellant's address in his pocket (Tr. 99, 104), the testimony that the appellant lied to the police (Tr. 106), and the testimony as to the pistol grips (Tr. 106, 109) were all brought out by defense counsel on cross examination. The only evidence against the appellant at the trial which was introduced by the prosecution was that the appellant had been seen on 13th Street with Pell and later alone.

These facts are not stated to suggest that appellant was deprived of his Constitutional right to counsel. They do suggest that this Court might wish to consider points not raised below.

It is recognized that counsel cannot fail in his duty to the court to make timely motions and objections "without danger of serious effect upon the due administration of justice, in which his responsibility is quite equal to that of the Court." Robertson v. United States, 84 App. D.C. 185, 186, 171 F.2d 345, 346 (1948). But, as in that case, this Court should reverse under Rule 52(b) of the Federal Rules of Criminal Procedure if there were plain errors affecting substantial rights of the appellant, even though not brought to the attention of the trial court. See also Simmons v. United States, 92 App. D.C. 122, 206 F.2d 427 (1953); Tatum v. United States, 88 App. D.C. 386, 190 F.2d 612 (1951).

Defendants charged with the same crime should normally be tried together. The question of a separate trial is in the sound discretion of the court. Where there is no error in denying a severance at the beginning of the trial what takes place during the trial may make it essential to grant new and separate trials after a verdict. United States v. Haupt, 136 F.2d 661 (7th Cir. 1943). Similarly, the misconduct of one defendant at a trial may so prejudice the jury as to require a new trial for a codefendant. Braswell v. United States, 200 F.2d 597 (5th Cir. 1952).

Rule 14 of the Federal Rules of Criminal Procedure provides:

"If it appears that a defendant . . . is prejudiced by a joinder of . . . defendants . . . for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires."

If the trial court, upon finding out that Pell was prepared to testify that he remembered the robbery and that the appellant took no part in it, had ordered a new trial for the appellant it would certainly have been appropriate action within its discretion. The question not having been raised below, the trial court had no opportunity to exercise that discretion. The issue before this Court is not whether there was an abuse of discretion in failing to order a new trial.

No discretion has been exercised. If discretion is to be exercised it must be done by this Court.

To enter an order for a new trial because of the prejudice of the codefendant's conduct at the joint trial below is not urged upon this Court as a matter of right. But this Court must concern itself not only with the form but with the substance. The appellant has been sentenced to what may be fifteen years in prison on the basis of thin circumstantial evidence. At the trial below the one witness who could unequivocally state that the appellant had no part in the crime claimed for his own reasons not to remember the occasion. The reason stemmed from the fact that he was on trial at the same time. It now appears that at a separate trial that witness is prepared to testify as to the robbery and will testify that the appellant had no part in it. In the interest of justice and so that an innocent man will not be convicted because of the false testimony of another, the Court should reverse the conviction and remand the cause for a new trial.

III

INSTRUCTIONS TO THE JURY

In view of the scant evidence, all circumstantial, against appellant and the overwhelming direct evidence against the codefendant below the court's failure to make any charge as to circumstantial evidence or to point out the differences in the evidence as between the two defendants substantially prejudiced the appellant.

Court-appointed counsel for appellant below requested no instructions to the jury and took no exception to the charge that was given. Rule 30 of the Federal Rules of Criminal Procedure provides that no portion of the charge or omission therefrom may be assigned as error unless timely objection was made. Nevertheless to correct error or omission substantially prejudicial to the rights of the appellant this Court may review the record under Rule 52(b).

In Williams v. United States, 76 App. D.C. 299, 131 F.2d 21 (1942) this Court reviewed the instructions to the jury and found omissions which had not been urged as error either at the trial or on appeal. The Court reversed the judgment below, primarily for the trial court's failure to instruct the jury adequately on the possibility of returning a verdict of not guilty.

Again, in Tatum v. United States, 88 App. D.C. 386, 190 F.2d 612 (1951) this Court reversed a conviction where the trial court had failed to instruct the jury on an essential question of law raised by the evidence but not called to the court's attention below. The Court there pointed out that failure on the part of a trial court to instruct on all essential questions of law involved in the case whether requested or not would clearly affect substantial rights and require reversal under Rule 52(b). The question in this case is whether there were omissions or errors in the instructions below as to essential questions of law.

The critical question of law here is how the jury should weigh and appraise the evidence. The evidence against appellant was meager and wholly circumstantial.

In Holland v. United States, 348 U.S. 121 (1954) the Supreme Court found that a failure to charge specially as to circumstantial evidence was not so erroneous and misleading as to constitute grounds for reversal. This was held to be true where the jury had been properly instructed on the standards for reasonable doubt.

In the Holland case at issue was the "net worth" method of proving violation of the income tax laws. The evidence before the jury was wholly circumstantial. They were asked to deduce from that evidence the guilt of the taxpayer. There was no substantial chance of their giving undue weight to the circumstances since that was the sole issue before them.

Where a particular defendant is tried on the basis of both direct and circumstantial evidence, again it is not error to fail to charge specially as to circumstantial evidence. Barshop v. United States, 191 F.2d 286, re-hearing denied, 192 F.2d 699 (5th Cir. 1951), cert. denied, 342 U.S. 920 (1952). The chance that the jury would disbelieve all of the direct evidence and accept the circumstantial is sufficiently remote to make the charge unnecessary.

But where, as in the instant case, two defendants are tried jointly, one on the basis of a mass of direct and persuasive evidence, the other on the basis of circumstances alone, it is submitted that a charge on circumstantial evidence is still essential. The same jury is considering both defendants and is considering both direct and circumstantial evidence. The average juror will not be quick to perceive that the evidence as to one defendant is of a type more persuasive than that applicable to the other.

In deciding upon the guilt of Pell the issue was simply one of the credence of witnesses. If the jury believed that the witnesses were telling the truth, Pell

was almost certainly guilty. Without having the distinction pointed out to them the jury would be likely to apply the same test to the appellant -- if they believed that all the witnesses were telling the truth they would find the appellant guilty. The jury's attention was never called to the possibility that even if all the testimony as to the appellant were true there might still be reasonable hypotheses of his innocence.

In a case where the bulk of the testimony was patently reliable and concerned with eye-witness accounts of the armed robbery committed by Pell, little attention was given to the issue of appellant's guilt or to the type of evidence offered to prove it. The government's final argument and rebuttal to the jury covers nine pages of the transcript. Of those pages 12 lines were about the appellant. If justice is to be done in such a case the Court must call to the attention of the jury that as to a particular defendant the evidence is wholly circumstantial and that the jury must not only believe that the circumstances occurred but that those circumstances exclude any reasonable hypothesis of that defendant's innocence. The prejudice from failure to so charge the jury is particularly grave where, as here, there was so little evidence of any kind against the appellant.

This Court in the Curley case and thereafter has steadfastly referred to the special standards to be applied by a jury when it is considering a verdict based on circumstantial evidence. It is understood that special instructions are regularly given as to circumstantial evidence in the court below. The Court may agree that in the circumstances of the Holland case there is no substantial prejudice and it is not reversible error to fail to give those instructions. It is submitted, however, that the Holland case should not be extended so as to dispense with those helpful guides in a case such as this. Here,

because of the two defendants against whom different types of evidence were presented, the failure to instruct the jury as to circumstantial evidence produced obvious and substantial prejudice to the appellant.

WHEREFORE, the judgment appealed from should be reversed and either a judgment of acquittal entered or, should the evidence be deemed sufficient, the cause remanded for a new trial.

Respectfully submitted,

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Washington 5, D. C.

Counsel for the appellant

December 21, 1955.

BRIEF FOR APPELLEE

**United States Court of Appeals
For the District of Columbia Circuit**

No. 12,937

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED FEB 10 1956

RALPH W. SCOTT, Appellant

Joseph W. Stewart

CLERK

v.

UNITED STATES OF AMERICA, Appellee

**Appeal From the United States District Court for the
District of Columbia**

LEO A. ROVER,
United States Attorney.

**LEWIS CARROLL,
ARTHUR J. McLAUGHLIN,
NATHAN J. PAULSON,**
Assistant United States Attorneys.

Of Counsel:

TED D. KUEMMERLING,
*Legal Research Assistant,
United States Attorney's Office.*

QUESTIONS PRESENTED

In a case where the facts disclose that the codefendant robbed a store at gun point; that five minutes before the robbery, appellant was in conversation with the robber immediately across the street from the scene of the crime; that the robber had appellant's address and apartment number with the inscription, "enter through the rear" on a paper in his possession; that gun grip plates which fitted the crime weapon were found in appellant's apartment; that appellant falsely denied knowing the robber although they had been drinking together in appellant's apartment all that day; that right after the commission of the crime appellant was seen on the street a short distance from the scene of the crime; and that appellant falsely denied being in the street at all that day;

In the opinion of the appellee, the following questions are presented:

1. Did the trial court err in sending the case to the jury under proper instruction?
2. Did the trial court err in omitting to give an instruction on circumstantial evidence even though none was requested.
3. Was appellant prejudiced by being tried jointly with the codefendant, no request for severance having been made.

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**United States Court of Appeals
For the District of Columbia Circuit**

No. 12,937

RALPH W. SCOTT, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

**Appeal From the United States District Court for the
District of Columbia**

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant and a codefendant were charged with robbery in violation of District of Columbia Code (1951) § 22-2901, by an indictment filed on February 7, 1955 (J.A. 52). Pleas of not guilty were entered on February 11, 1955 (J.A. 53). On May 2, 1955, after trial by jury, a verdict of guilty was returned (J.A. 53, 54). Appellant was sentenced to serve a term of imprisonment from five years to fifteen years (J.A. 54). Only appellant now appeals.

The record shows that appellant and his codefendant were friends and had known each other for several years (J.A. 40). On January 20, 1955, the codefendant visited with appellant and appellant's wife. A drinking party

ensued which began early that morning and lasted far into the afternoon. Three half gallons of wine and some whiskey had been consumed (J.A. 38, 39, 43).

Mr. Emanuel Miller testified that he had left his store for the purpose of purchasing some food at a delicatessen store a few doors away at about 7:15 p.m. on January 20, 1955 (J.A. 10). After making the purchase he walked across the street from his store where his car was parked for the purpose of putting the food in it (J.A. 10). While proceeding to and from the car he saw appellant, who was a comparatively new wine customer, in conversation with the codefendant. This was directly across the street from the scene of the holdup (J.A. 9). Although he did not speak with him the street light and restaurant lights were sufficient to positively identify them both (J.A. 11). He immediately returned to the store and within five minutes thereafter Pell, the codefendant, came into the store and attempted to hold it up at gun point (J.A. 9, 10). Mrs. Miller, President of Mid City Liquors, also positively identified appellant as a recent customer (J.A. 19).

Mrs. Geneva Palmer, appellant's landlady, testified that she was in the vicinity of the holdup at about 7:35. She had been walking her dog around the block and when she was coming up 13th Street she saw appellant standing at the alley near the Commander Apartments which were across the street from the scene of the crime (J.A. 21, 22). He was standing there right at the sidewalk (J.A. 23). She definitely recognized appellant at the scene at approximately 7:45 p.m. (J.A. 24).

Officer Paul, of the Metropolitan Police Force, testified on cross-examination by codefendant's counsel, that when he questioned the codefendant regarding another crime which he admitted, he stated that "Scott was in with him on the [Mid-City Liquor Store] job but wasn't in with him on the 11th Street job" (R. 98). No objection was raised by appellant to the answer. In fact, appellant's counsel questioned Paul regarding the statement (J.A. 32). Paul stated that when appellant was brought in to confront the codefendant, the latter refused to make any statement

in appellant's presence (J.A. 32). He further testified that when the codefendant was arrested a note was found inside his wallet containing appellant's address and apartment number with the additional notation "Enter through the rear" (J.A. 32).

Officer Georgantis, of the Metropolitan Police Force, testified that on January 20, 1955, he arrested appellant at his home at approximately 8:00 (J.A. 33). He testified that he was permitted into the house by Mr. Palmer who stated upon question that the codefendant did not reside there (J.A. 35). He then proceeded to Apartment 15 which was the number on the slip of paper that which had been in the codefendant's wallet. He knocked on the door and was asked in by appellant. When asked on cross-examination by appellant's attorney why he had arrested appellant, the officer stated (J.A. 35):

"First of all, we found a pair of gun grips on his dresser top, and the gun we took of Pell didn't have any gun grips. They matched pretty good. Second of all, I had asked Mr. Scott if he knew a Mr. Pell. He said no, he never knew a Mr. Pell. I described Mr. Pell, and he said he never heard of him even then. And I asked him if he had been out of the house. He said no, he had been home all day. And I had just finished talking Mrs. Palmer. She said she had seen Mr. Scott standing on 13th Street, right across the street from the liquor store, about the time of the holdup. Mr. Scott denied even being out of the house or even knowing Mr. Pell."

The officer, upon cross-examination by appellant's attorney, corroborated Pell's implication of appellant (J.A. 37). It is to be noted that a special instruction to the jury was made in the general charge as to the weight to be given to Pell's statement made out of appellant's presence (J.A. 50).

Codefendant Pell took the stand and testified that he had known appellant for some years (J.A. 40); that there had been a drinking party at appellant's house on January 20, 1955 when he had come to visit (J.A. 38); that he had given appellant's wife money to buy wine

(J.A. 39); that he had been told by appellant in the morning that he (Pell) was sober enough to go collect some money from his employer (J.A. 41); that he had not collected the money at that hour because the boss told him to come back later (J.A. 39); that he returned to appellant's apartment and later in the afternoon he had gone again to collect the money which he did (J.A. 43); that he had been drunk at the time but the "bossman" had honored the note which appellant had given him (J.A. 44); that he returned to the apartment and that he did not remember where or when he had gotten the gun (J.A. 44, 45).

STATUTES AND RULES INVOLVED

District of Columbia Code § 22-105 provides:

Persons advising, inciting, or conniving at criminal offense to be charged as principals.—In prosecutions for any criminal offense all persons advising, inciting, or conniving at the offense, or aiding or abetting the principal offender, shall be charged as principals and not as accessories, the intent of this section being that as to all accessories before the fact the law heretofore applicable in cases of misdemeanor only shall apply to all crimes, whatever the punishment may be.

District of Columbia Code § 22-2901 provides:

Robbery.—Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Federal Rules of Criminal Procedure, Rule 14 provides:

Relief From Prejudicial Joinder.—If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

Federal Rules of Criminal Procedure, Rule 33 provides:

New Trial.—The court may grant a new trial to a defendant if required in the interest of justice. If trial was by the court without a jury the court may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 5 days after verdict or finding of guilty or within such further time as the court may fix during the 5-day period.

SUMMARY OF ARGUMENT

The evidence was sufficient to go to the jury and support the verdict. The trial court correctly instructed the jury on all phases of the law including burden of proof beyond a reasonable doubt resting upon the Government. The jury found that the proven circumstances were not as consistent with innocence as with guilt. That verdict should not be disturbed.

The trial court did not err by failing to instruct the jury as to circumstantial evidence. The law is well settled that such an instruction is not at all necessary where the court has instructed the jury upon the Government's burden of proof beyond a reasonable doubt. In any event appellant failed to request such an instruction.

Since no request was made by appellant at or before the trial, he can *not* now claim that the trial court abused its discretion in permitting a joint trial. Had such a request been made and denied, there would not have been an abuse of discretion by the trial court in the light of the facts at bar.

ARGUMENT

I

The Evidence Was Sufficient to go to the Jury and to Support the Verdict

Appellant contends that the Government's proof was insufficient to sustain the conviction. This contention lacks merit.

The instant case falls squarely within the rule and tests set forth in *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229 (1947), *cert. denied*, 331 U.S. 187; and *Remmer v. United States*, 205 F. 2d 277 (9th Cir. 1953). In the *Curley* case, the Court stated, p. 232:

* * * The true rule, therefore, is that a trial judge in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence giving full play to the right of the jury to determine credibility, weigh, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. *If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter.* * * * *But if a reasonable mind might fairly have a reasonable doubt or might not fairly have one, the case is for the jury, and the decision is for the jurors to make.* (Emphasis added).

In the *Remmer* case, *supra*, the court set forth the rule as follows (p. 287):

* * * The test to be applied on a motion for acquittal in such a case, however, is not whether in the trial court's opinion the evidence fails to exclude every hypothesis of guilt, but rather whether *as a matter of law* reasonable minds, as triers of fact, *must* be in agreement that reasonable hypothesis other than guilt could be drawn from the evidence. *Stoppelli v.*

United States, 9 Cir., 1950, 183 F. 2d 391, *cert. denied* 340 U.S. 864, 71 S. Ct. 88, 95 L. Ed. 631. If reasonable minds *could* find that the evidence excludes every reasonable hypothesis but that of guilt the question is one of fact and must be submitted to the jury. *Curley v. United States*, 1947, 81 U.S. App. D.C. 389, 160 F. 2d 229, *cert. denied*, 331 U.S. 837, 67 S. Ct. 1511, 91 L. Ed. 1850; *Stoppelli v. United States*, *supra*.

In the instant case identification of appellant was positive. The evidence points to his complicity in the crime of armed robbery. The jury and the trial judge had full opportunity to observe all the witnesses, and hear their testimony and weigh their credibility. Appellant was observed in conversation with his co-defendant very close to the scene of the crime several minutes before the commission thereof. He had spent a full morning and day with the co-defendant in his own apartment in a drinking orgy. He was observed a short distance away during the commission of the crime. The gun grips were found in his apartment and they matched the gun used in the crime. He falsely denied knowledge of the co-defendant. He falsely denied being outside of his apartment all day. These falsities showed a clear consciousness of guilt.¹

The charge to the jury was complete and protected every right of appellant. It must be assumed that the jury, in conformity with the instructions given them, weighed all the evidence and negatives any conclusion consistent with appellant's innocence. It must also be assumed that the trial judge, after listening to the witnesses, arrived at the conclusion that a reasonable mind could find from the testimony that there was enough evidence to exclude every reasonable hypothesis of innocence. Appellant states in his brief, page 28, "that, consistent with the evidence, appellant might conceivably have been urging Pell to commit robbery cannot be denied". He urges too, that it might have been the opposite, i.e., an admonition not to

¹ It is important to note at this point that the trial judge in his charge instructed the jury that the statement made by the co-defendant regarding appellant's complicity was not to be considered as evidence against him (J.A. 50).

commit the crime. However, the jury could have inferred from the substantial evidence before it that the original idea of the crime was appellant's for the reason that he resided in the neighborhood; was a customer in the store; was familiar with the habits of the owner and the people in the community; and suggested to Pell that this place would be a good one to "stick up" at the particular time while he served as the look out; that as the crime was in operation and Pell was being apprehended, appellant attempted to remove himself from the scene as surreptitiously as possible but had the misfortune to encounter Mrs. Palmer at the alley before he had an opportunity to disappear therein. There is, however, nothing in the record detailing the conversation.

Appellant attempts to belittle the paper with his address found upon Pell, by stating this his apartment fronted on the alley. The evidence discloses that the entrance to the building was on "M" Street. It was coincidental that his apartment had an exit into the alley. However, the jury may have found it difficult to believe that any respectable citizen would make use of an alley entrance to an apartment at night in January when a lighted entrance from the street would be so much safer.

This Court, in the case of *Wigfall v. United States* (No. 12,826, decided February 2, 1956), in considering a conviction based solely upon circumstantial evidence and the testimony of only one witness stated:

In our jurisprudence the credibility of witnesses and the derivation of the truth from oral testimony are preposed in the hearer of the witnesses. Demeanor, inflection and gesture, both on direct examination and under cross examination, are elements in those determinations. Sole witnesses are commonplace of the courtroom. The jury chooses what to believe and whether the proof thus believed is convincing beyond a reasonable doubt.

* * * * *

This Court has held several times that the verdict of the jury must be sustained if there is substantial evidence to support it.

The proven circumstances in the instant case are not as consistent with innocence as with guilt. Appellant is now attempting to have this Court substitute its judgment for that of the jury which had the opportunity to hear the witnesses and weigh their credibility. The trial court correctly charged the jury on the burden of proof by the Government and the question of reasonable doubt. Under all the rules of this Court, as set forth above, it was the jury's function to arrive at a conclusion. This it did and appellant's contention must fail.

II

The Trial Court Did Not Err by Not Instructing on Circumstantial Evidence Particularly Where No Request for Such Instruction Was Sought

Appellant in Point Three of his brief stresses the fact that the trial court failed to make any charge as to circumstantial evidence although none had been requested. He infers that if a charge had been given no prejudice would have resulted to appellant and he might have been acquitted. One could infer too, that had a charge been given appellant would have been convicted.

It is interesting to note that no request for instructions were made nor were there any exceptions taken to the charge. The law is well settled that failure to make objection, failure to state distinctly the matter to which an objection is taken, and failure to state the ground for the objection before the jury retires to consider the verdict, is a bar to the claim that the trial court committed error in its charge. Rule 30, Federal Rules of Criminal Procedure, provides in pertinent part:

* * * No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection.

See also, *Villaroman v. United States*, 87 U.S. App. D.C. 240, 242, 184 F. 2d 261, 262 (1950); *Ziegler v. United*

States, 174 F. 2d 439 (9th Cir. 1949). The law is equally well settled that on appeal an appellant is foreclosed from complaining that the trial court did not instruct on circumstantial evidence where no request was made for such an instruction. See *Hughes v. United States*, 231 F. 2d 50 (5th Cir. 1916); *United States v. Tramaglin*, 197 F. 2d 928 (2nd Cir. 1952); *United States v. Augustine*, 189 F. 2d 587 (3rd Cir. 1951); *Herman v. United States*, 48 F. 2d 479 (5th Cir. 1931). A similar contention was raised in this Circuit in *Shay v. United States*, 93 App. D.C. 379, 212 F. 2d 809 (1954), but this Court found that it did not "require discussion"; and in *Gray v. United States*, 94 App. D.C. 40, 211 F. 2d 650 (1954), it was rejected in a per curiam decision that found "no prejudicial error."

However, even if timely request and objection had been made, there would be no error, much less reversible error, for the instructions as given fully complied with the rules laid down by the courts. The so-called circumstantial evidence instruction has been held to be too technical for practical application and the federal courts have within the last twenty or twenty-five years held that it need not be given if the judge instructs the jury that they must be satisfied of the defendant's guilt beyond any reasonable doubt. *McCoy v. United States*, 169 F. 2d 776, 784 (9th Cir. 1948); *United States v. Becker*, 62 F. 2d 1007 (2nd Cir. 1933); *United States v. Austin-Bagley Corporation*, 31 F. 2d 229 (2nd Cir. 1929). In the *Becker* case, *supra*, the court expressed its opinion on the circumstantial evidence instruction in clear language as follows (p. 1010):

The judge failed to charge the jury as to circumstantial evidence contenting himself with an entirely neutral statement of the opposed contentions of the parties *though he had been asked to say that such evidence was enough only when it foreclosed the hypothesis of innocence*. He had with ample elaboration told them that they must be satisfied beyond a fair doubt of the defendant's guilt and that in our judgment was enough though some courts have held otherwise. The requirement seems to us a refinement which only serves to confuse laymen into supposing that they should use circumstantial evidence other-

wise than testimonial. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these as do inferences from events. A jury tests a witness' credibility by using their experience in the past as to similar utterances of persons in a like position. That is precisely the same mental process as when they infer from an object what has been its past history or from an event what must have preceded it. All that can be asked is that the importance of the result to the accused shall demand a corresponding certainty of his guilt; and this is commonly and adequately covered by telling them that the conclusion shall be free from fair doubt. To elaborate this into an inexorable ritual or to articulate it for different situation is more likely to impede than to promote their inquiry. (Citations omitted. Emphasis supplied.)

In the instant case, the trial court carefully instructed as to the rights of appellant as follows (J.A. 48, 49, 50):

You are told that in the first instance, there is a presumption in law that the one who stands accused is not guilty of the offense with which he is charged. This presumption of innocence should prevail in the minds of the jury in such a way as to cause them to find the defendant not guilty, unless from all of the evidence in the case the jury are convinced beyond a reasonable doubt that the defendant is in fact guilty of the offense with which he is charged.

The burden of proof rests upon the Government, which means that before this jury will be warranted in finding these defendants or either of them guilty, the Government must prove that guilt and the jury must find that guilt from the evidence to its satisfaction beyond a reasonable doubt. A reasonable doubt means such a doubt as will leave the juror's mind, after a candid and impartial investigation and consideration of all of the evidence and of all the facts and circumstances shown in the case, so undecided that the juror is unable to say that he or she has an abiding conviction of the defendant's guilt. It is such a doubt as in the graver and more important transactions of life would cause a reasonable and prudent person to hesitate and pause. If the evidence fails to come up to this standard, it is such as to warrant such a doubt,

and if you have such a reasonable doubt as to the guilt of either of these defendants, the law requires that you give that defendant concerning whom you have such reasonable doubt of guilt the benefit of that doubt and acquit him.

The words reasonable doubt must be given their usual and ordinary meaning. The doubt must not be trivial or whimsical. It should not be based upon groundless conjecture and should not be sought after, for when it is such a doubt as the law recognizes, it comes fairly and naturally into the minds of the jury and arises out of the evidence or from a lack of necessary evidence. It must be such a doubt as appears to you to be reasonable in the circumstances of the case as shown by the evidence.

Since the defendants Pell and Scott are jointly indicted in Criminal Case 120-55, there is a principle of law which I should bring to your attention. It is this. If two or more persons are jointly engaged in an unlawful enterprise, each person so jointly engaged adopts as his own everything done or said by any other person so jointly engaged in the furtherance of the common unlawful purpose. This principle of law arises out of the statute which provides that in prosecutions for any criminal offense, all persons advising, inciting or conniving at the offense or aiding or abetting the principal offender shall be charged as principal.

I mention this principle of law because you are told that if you find that Scott was jointly engaged in the purpose of committing the robbery of Clara L. Miller of the property of the Mid-City Liquors, Inc., a body corporate, with the defendant Pell, and if you find that Pell committed the robbery as charged and that Scott was jointly engaged with him in the perpetration of the robbery, it would make no difference what part one took, what part the other took. And so, since there is no evidence that Scott entered the liquor store, you cannot convict unless you find that Pell committed the crime and that Scott was concerned and interested with him in the perpetration of that crime and stood outside as a lookout to protect Pell in the commission of the crime or to make his escape after the offense was committed or for some other

purpose connected with the plan to perpetrate the crime.

Certain evidence has been received that when in the custody of the police officers the defendant Pell made certain oral statements or admissions. You are told that statements or admissions freely and voluntarily made by one at a time when he is possessed of his senses and knows what he is saying and doing may be considered and weighed by the jury as bearing upon the question of that defendant's guilt, but the evidence relating to any such oral statement or admission must be considered and weighed by the jury with caution.

Now you are told that the evidence before the jury relating to such oral statements or admissions by the defendant Pell does not indicate the statements were made in the presence of the defendant Scott. Accordingly, any statements or admissions made by Pell, as you may find from the evidence, may not be considered and weighed as against the defendant Scott.

The charge was complete and covered all the detail necessary with respect to appellant. Appellant's argument regarding the failure of the trial judge to charge that circumstantial evidence was enough only when it foreclosed the hypothesis of innocence was considered in the *Becker* case, *supra* and rejected.

III

Since No Request to Sever the Trial Was Made the Trial Court Did Not Err or Abuse Its Discretion in Not Ordering Two Separate Trials Where There Was No Prejudice Alleged or Shown

Appellant in his second argument attempts to have this Court reverse the conviction upon the ground that the trial court, in failing to sever the trial of the two defendants *after the Government's case had been concluded or after the entire case was concluded*, on its own motion in effect abused its discretion which it was not called upon to exercise.

He makes a major assumption that Pell lied throughout the trial which caused prejudice to appellant. He over-

looks the fact that if Pell committed perjury upon that trial he may now be committing perjury in the affidavit now used for the first time in his brief but not made part of the record below (Br. at p. 29). It should be pointed out that the affidavit does not vary from *his* testimony at the trial. He never testified on the trial that appellant was party to the crime. There is nothing in the record to prove that Pell would testify that appellant was not a participant to the act. The Government suggests that Pell, now fully aware that no further punishment can be meted out, would, as a confirmed criminal, attempt to "bail out" his co-defendant by telling any seemingly credible story.

The trial court, even if asked to sever, would not have abused its discretion if it denied a motion on that score. Here, the indictment consisted of one count. The evidence produced by the Government was short, simple, separable, and distinct. Appellant was not embarrassed or confounded in his defense because both defendants were tried together. The jury clearly could understand the differences between the activities of both defendants. Under all the circumstances presented in conjunction with the very fair charge, no substantial rights of appellant were affected within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure. See *Maurer v. United States*, 95 U.S. App. D.C. 389, 222 F. 2d 414, (1955), and *Dunaway v. United States*, 92 U.S. App. D.C. 299, 205 F. 2d 23 (1952).

It is to be noted that appellant seeks a new trial (Br. at p. 32). However, his "motion" is addressed for the first time to this Court—no motion having been in the lower court. His request evades the purpose and intent of the Federal Rules (F. R. Crim. P. 33), and should be denied.

In any event, a study of the affidavit filed in support of the "motion" reveals that it contains weak and vague statements by the co-defendant. Further, it is readily apparent that this so-called evidence is not newly discovered, that appellant failed to show diligence in obtain-

ing it, that it is cumulative and impeaching and that it would probably not result in an acquittal on new trial. *Thompson v. United States*, 88 U.S. App. D.C. 235, 188 F. 2d 652 (1951).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

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